SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, PETITIONER,

vs.

THE WILLETT COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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—1992

[fols. 1-4] [Caption omitted]

[fol. 5]

IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1949

CITY OF CHICAGO, a Municipal Corporation, Appellant,

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago

Honorable R. P. Drymalski, Judge Presiding

Abstract of Record from Municipal Court of Chicago

Placita COMPLAINT—Filed March 10, 1949

Complaint filed by the City of Chicago March 10, 1949, in the office of the Clerk of the Municipal Court, No. 49 MC 131413, which, omitting the caption and vertification, is in words and figures as follows:

> Walter Gorski being first duly sworn, on oath, on information and belief, deposes and says, that The Willett Co. D. M. Goodwille Mgr. heretofore, to wit, on the 1st day of March 1949 at the City of Chicago, did then and there violate the Municipal Code of Chicago, to wit:
>
> > Did then and there conduct, operate and carry on the business of Carters License Tax 100 trucks on the premises known as 700 S. Desplaines St., Chicago, Illinois, without first having obtained a license so to do.
>
> In violation of Chapter 163-2 of the Municipal Code of Chicago.

[fol. 6] Order entered March 10, 1949 granting leave to file complaint instanter and cause postponed and set for trial April 20, 1949.

Order entered April 20, 1949 cause postponed and set for trial May 4, 1949.

Order entered May 4, 1949, cause postponed and set for trial May 17, 1949.

Order entered May 17, 1949, cause postponed and set for trial June 16, 1949.

Order entered June 16, 1949, cause postponed and set for trial July 7, 1949.

Order entered July 7, 1949, cause postponed and set for trial July 11, 1949.

IN MUNICIPAL COURT OF CHICAGO

WAIVER OF JURY TRIAL—July 11, 1949

Thereupon, defendant on July 11, 1949, defendant elects to waive a trial by jury and cause is submitted to court for trial without a jury.

IN MUNICIPAL COURT OF CHICAGO

JUDGMENT

Now come the parties to this cause, and thereupon this cause comes on in regular course for trial before the Court without a jury and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit:

"The Court Finds the Defendant Not Guilty."

This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the finding herein, that the plaintiff take nothing by this suit, and it is ordered that said defendant be and hereby is discharged.

IN MUNICIPAL COURT OF CHICAGO

CERTIFICATE OF TRIAL JUDGE

Certificate of the Judge that validity of a Municipal Ordinance is involved, filed July 12, 1949, which, omitting caption and signature, is in words and figures as follows:

[fol. 7] I, Raymond P. Drymalski, Judge of the Municipal Court of Chicago, Illinois, before whom and

by whom the above entitled cause was tried and final decree and order therein entered, do hereby certify that there is involved in said cause and in said final decree and order the validity of a municipal ordinance, and I further certify that in my opinion the public interest requires that an appeal herein shall be taken directly to the Supreme Court of Illinois.

IN MUNICIPAL COURT OF CHICAGO

NOTICE OF APPEAL—Filed July 18, 1949

I

City of Chicago, a municipal corporation, plaintiff-appellant above named, hereby appeals from the final judgment order entered in this cause July 11, 1949, finding the issues in favor of the defendant on the complaint by the plaintiff, that the defendant had violated chapter 163 of the Municipal Code of Chicago, and particularly section 163-2 thereof.

[fol. 8] II

Appellant prays that said judgment may be reversed or in the alternative, that said judgment be vacated and the cause remanded for a new trial.

City of Chicago, a Municipal Corporation, Plaintiff-Appellant, by Benjamin S. Adamowski, Corporation Counsel, Its Attorney.

July 18, 1949.

Notice of filing Notice of Appeal filed July 18, 1949.

Praecipe for Record and Proof of Service thereof filed July 18, 1949.

Order entered July 27, 1949, approving Report of Proceedings and ordering same filed.

Report of Proceedings filed July 27, 1949, at the hearing of the above entitled cause before the Honorable Raymond P. Drymalski, Judge of said Court, on the 7th day of July, A. D. 1949.

Present: Mr. Benjamin S. Adamowski, Corporation Counsel for the City of Chicago, by Mr. Marvin Peters, Assistant Corporation Counsel, Appeared for Plaintiff;

Messrs. Daley & Lynch, by Mr. William J. Lynch, Appeared for Defendant.

The Court: Leave given to Mr. Peters to amend the complaint.

[fol. 9] Mr. Lynch: I will ask leave of the Court to file a stipulation mentioned heretofore on behalf of the defendant and the plaintiff in this case.

The Court: Stipulation may be filed.

Mr. Peters: We are going to proceed here to file the stipulation, and then, you are going to put on some evidence.

Mr. Lynch: That's right, on behalf of the defendants.

Stipulation, omitting signatures and caption, in words and figures as follows:

IN MUNICIPAL COURT OF CHICAGO

STIPULATION OF FACTS

It is hereby stipulated by and between the attorneys for the respective parties herein that the following matters and facts, material to the controversy in this cause may be incorporated in the transcript of the record.

It is further stipulated and agreed that the defendant herein expressly reserves the right to object to Chapter 163, Sections 1 to 4 of the Ordinances, of the City of Chicago, on the ground that said Ordinance is void and of no legal effect because it is in conflict with the Constitution of the United States of America, the Constitution of the State of Illinois, Section 23-51, of the Cities and Villages Act, of the State of Illinois and the Illinois Truck Act, Section 240 to 281, of the Motor Vehicle Act, of the State of Illinois.

During all the times herein mentioned, there were in effect, in the State of Illinois, the statutory provisions hereinafter set forth:

[fol. 10] Section 23-51, of the Cities and Villages Act contains the following provisions:

> Smith-Hurd Illinois Annotated Statutes, Chapter 24, Article 23-51. "To license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation."
>
> Smith-Hurd Illinois Annotated Statutes, Chapter 95½, Motor Vehicles, Section 240.

"Legislative declaration of necessity for truck traffic regulation.

"The legislature hereby declares that the rapid increase of truck traffic and the fact that under the existing laws many trucks designed or used for the transportation of property are not effectively regulated have increased tremendously the dangers and hazards of public highways, thus necessitating the enactment of more stringent regulations for the protection of the general public in the use of the highways; that ruinous competitive practices among carriers of property by truck and for hire are directly responsible in a considerable degree for the appalling loss of life and bodily injury resulting from such traffic hazards; and that in order to conserve the highways, reduce traffic hazards and accidents and promote a sound, economical and efficient system of highway transportation to serve the best interests of the general public, this Act is considered imperative."

That on or about January 14, 1949, the City Council of the City of Chicago enacted a certain Ordinance relating to the licensing of carters in the City of Chicago. The Ordinance is set forth in the bound volume of the Municipal Code of Chicago, as adopted January 14, 1949, in Chapter 163 thereof as follows:

[fol. 11] Be it ordained by the City Council of the City of Chicago:

Section 1. This Ordinance shall be known as Chapter 163 of the Municipal Code of Chicago, and shall be designated as the Carters Ordinance:

Chapter 163

Carters

163-1. Every express wagon, cart, truck, dray, wagon, automobile, autocar, auto truck, or other vehicle of any kind, either drawn by animal or self-propelled, which shall be operated, driven or employed for the purpose of transporting or conveying bundles, parcels, furniture, trunks, baggage, goods, wares, merchandise, produce, or other articles within the city for hire or reward,

shall be deemed a cart within the meaning of this chapter, whether such vehicle is employed or hired from any public stand, public way, barn, garage, office, or other place in the city by the day, week, month or year.

Any person engaged in the business of operating a cart shall be deemed a carter.

163-2. An annual license tax is imposed upon every carter for each cart operated or controlled by him, according to the following schedule:

Horsedrawn vehicle—	
One-horse	$2.75
Two-horse	5.50
Three-horse	6.25
Four-horse	11.00
Six-horse	13.75
Automotive vehicles—	
Capacity not exceeding two ton-	$8.25
Capacity exceeding two but not exceeding three tons	11.00
Capacity exceeding three but not exceeding four tons	13.00
Capacity exceeding four tons	16.50

[fol. 12] No license shall issue except upon payment of the full annual license tax.

It shall be unlawful for any person to engage in the business of a carter without first having paid such license tax.

163-3. An application shall be made in conformity with the general requirements of this code relating to applications for licenses and such application shall include a statement of the number of vehicles with such details of description and on such forms as may be required by the City Collector.

The City Clerk shall deliver to each carter, upon payment of the license tax herein imposed, a license emblem which shall bear the words "carter" and the numerals designating the year for which such license tax has been paid. It shall be the duty of the carter to affix the license emblem in a conspicuous place on the vehicle. It shall be unlawful for any person to drive a cart which does not bear such license emblem.

163-4. Any person violating any of the provisions of this chapter shall be fined not less than fifty dollars nor more than two hundred dollars for each offense and each day such violation shall continue shall be regarded as a separate offense.

Section 2. Chapter 163, entitled "Public Carters" as it has heretofore appeared in the Municipal Code of Chicago is hereby repealed.

Section 3. Chapter 132, entitled "Furniture Movers" of the Municipal Code of Chicago, is hereby repealed.

Section 4. This Ordinance shall be in force and effect upon passage and due publication.

During all the times herein mentioned the plaintiff, City of Chicago, was a Municipal corporation organized and existing under the provisions of the Act of the General Assembly of the State of Illinois, entitled "An Act to provide [fol. 13] the incorporation of Cities and Villages," approved April 10, 1872, in force July, 1872, and the amendments thereto and the Acts supplemental thereto.

The Defendant, the Willett Company, an Illinois corporation located at 700 South Desplaines Street, Chicago, Illinois, was at all times mentioned herein engaged in the business of transporting property by motor vehicles for hire in the City of Chicago and the State of Illinois, and is also engaged as a contract carrier of commodities and freight generally by motor vehicle, operating from points and to places within the State of Illinois to points and places in the States of Indiana and Wisconsin.

That on or about the first day of March, 1949, the Willett Company advertised and held itself out to serve the public and connecting carriers and forwarding companies generally, up to the limit of his capacity either (a) by leasing trucks with drivers to shippers by the hour, day, week, year or other period, (b) by making contracts with shippers to perform all trucking for a fixed period, (c) by giving occasional service or handling single shipments in local cartage for any shipper, at a rate per hundred pound, per ton, per piece, or other unit, (d) by distributing pooling cars and (e) by rendering collection and delivery service, station or sub-station service for rail, water and highway motor carriers and forwarding companies either under contract or on some other basis.

The motor vehicles operated by the Willett Company will in the course of a day's business transport property for hire:

1. From points within the City of Chicago to other points within the City of Chicago.

[fol. 14] 2. From points within the City of Chicago to other points in the State of Illinois outside the City of Chicago.

3. From points in the State of Illinois outside the City of Chicago to points within the City of Chicago.

4. From points in City of Chicago to points in Indiana.

5. From points in Indiana to points in the City of Chicago.

6. From points in Illinois, outside of the City of Chicago, to points in Indiana.

7. From points in Indiana to points in Illinois, outside of the City of Chicago.

8. From points in City of Chicago to points in Wisconsin.

9. From points in Wisconsin to points in the City of Chicago.

10. From points in Illinois, outside of the City of Chicago to points in Wisconsin.

11. From points in Wisconsin to points in Illinois, outside of the City of Chicago.

The Willett Company does not use or operate any horses or teams in the conduct of its business.

The Willett Company has not complied with the provisions of the Carters Ordinance as enacted by the City Council and has not secured licenses as provided therein.

The Willett Company does not solicit any business from any public stand or street in the City of Chicago, and the Willett Company has secured City Vehicle Licenses for all vehicles operated by them for the year 1949, and have complied with all City Ordinances that are necessary to be complied with to lawfully conduct its cartage business in the City of Chicago with the exception of the Carters Or-

[fol. 15] dinance herein in question.

The Willett Company has presently been granted authority from the Interstate Commerce Commission to operate as a common carrier, engaged in interstate commerce,

as evidenced by Certificate No. 20697, which certificate and authority is in full force and effect.

The Willett Company has filed with the Interstate Commerce Commission, the Willett Company Schedule No. 20, on the first day of July, 1948, and effective on the fourth day of August, 1948.

The Willett Company complies with all provisions of the Federal Motor Carrier Act of 1935, and all rules and regulations issued by the Interstate Commerce Commission relative to hours of service for its employes and rules of safety in the operation of its vehicles.

Pursuant to the provisions of the Illinois Motor Truck Act, the Willett Company has been granted authority to operate as a specialized, contract and local motor carrier of property in the State of Illinois said authority being evidenced by the following certificates, to-wit:

Local Carrier—Certificate No. 1132
Contract Carrier—Certificate No. 1163
Specialized Carrier—Certificate No. 11363

which certificates and authority are presently in full force and effect.

The Willett Company has complied with all other provisions of said Illinois Truck Act.

That the operations of the Willett Company are so diversified that one of the trucks may at various times during [fol. 16] the day haul to or from interstate contract carriers, common carriers and carload companies, in addition to haul between local industries and for them to points and places in Wisconsin, Indiana, and Illinois.

That no one vehicle operated by the Willett Company is engaged throughout any day of the year in a purely intrastate or local movement. Each vehicle of defendant during every single day of the year carries on it along with property which never leaves the city, property destined to some point in the State of Illinois outside the City of Chicago, as well as property destined to some point outside the State of Illinois.

That there are in the City of Chicago upwards of 1,000 persons, firms, or corporations engaged in the transportation of property by motor vehicles for hire and are transporting or conveying goods, wares, or merchandise upon the public streets of the City of Chicago.

That there are upwards of 2,000 individuals, firms, or corporations that are engaged in the transportation of property by motor vehicles for hire and are common and/or contract carriers of commodities and freight generally by motor vehicles, operating from points within the City of Chicago to points within the City of Chicago; from points within the City of Chicago to points within the State of Illinois outside the City of Chicago; from points within the City of Chicago to points in the State of Indiana and Wisconsin.

That there are therefore upwards of 3,000 individuals, firms or corporations so engaged, as to allegedly come [fol. 17] within the terms and provisions of this Ordinance, and who are similarly situated with the Defendants as to matters and things complained of herein.

That on or about the first day of March, 1949, the Defendant, the Willett Company, an Illinois corporation, was charged by the City of Chicago, with a violation of Chapter 163, of the Municipal Code of Chicago and on said date was served with an arrest notification commanding it to appear in the Municipal Court of Chicago on March 10, 1949, to answer the charge of engaging in the business of a carter, without having obtained a license to engage in such business.

It is further stipulated and agreed, that the annual budget of the City of Chicago as passed in January, 1949, provides no appropriation for the regulation of the business of Carters.

It is further stipulated and agreed that on the 14th day of January, 1949, the City Council of the City of Chicago passed the Carters Ordinance.

It is further stipulated and agreed that the terms of the Carters Ordinance do not impose any regulation upon the business of Carters nor does it prescribe any compensation to be received by Carters, but requires that Carters purchase an annual license for a certain fee.

[fol. 18] HOWARD L. WILLETT, JR., called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lynch:

My name is Howard L. Willett, Jr. I live at 1120 Lake Shore Drive. I am Executive Vice-President in The Willett Company, the defendant in this cause, continuously since 1932. The Company is engaged in the occupation of general trucking. In the course of our operation as general trucking, we engage in the hauling of interstate, intrastate, and local freight in the City of Chicago.

Q. Is it possible for you in your operation to separate your intrastate freight, your interstate freight, and your inter-city freight from your vehicles?

Mr. Peters: That is objected to unless Counsel lays a proper foundation. It is calling for the conclusion of the witness based on no facts in evidence.

The Court: I will overrule the objection.

A. No, we are not able to separate.

Mr. Lynch: Mr. Willett, could you withdraw from your interstate business and continue in your intrastate business?

Mr. Peters: I object for the same reason—nothing in the evidence here except that he is engaged in three different types of operation.

The Court: Why is that objectionable? I don't follow you.

Mr. Peters: Well, all he has testified to is all leading up to, he is engaged in interstate, intrastate, and inter-city operations.

[fol. 19] The Court: You can go into that on cross-examination. I overrule the objection.

Q. Could you withdraw from interstate business and continue in your intrastate business?

A. Not without considerable hardship.

Q. Could you withdraw from your inter-city, that is your local business, and continue either interstate or intrastate business?

A. No.

Mr. Peters: Let the record show my objection to the question.

The Court: All right.

The Witness. In other words, interstate, intrastate and local city business is not divisible. In general trucking we offer the public a flexibility of service.

Cross-examination.

By Mr. Peters:

The Willett Company and the Truck Lease Corporation of America together operate about 1,200 vehicles. Some are trucks, some are known as tractors, some are trailers, and included in there is the Willett transports. Operating under the name of The Willett Company I would say there are about 825 trucks.

Q. Are any of those 825 trucks operated in local transports where you transport from one point in Chicago to another point in Chicago?

A. I would say almost all of them were. We have contracts with certain concerns in Chicago to do all their hauling. Some of the larger contracts are with Pennsylvania Railroad, Acme Fast Freight, The Air Cargo, which represents all the airlines, Ryerson Steel Company, U. S. Steel Company, Youngstown Steel Company, H. J. [fol. 20] Heinz Company, Standard Brands—I don't know how many more you want. The Glidden Company, the Nubian Paint Company, the Durkee Famous Foods, the Soy Products Company, and Adams and Elding Paint Company each has a different address, all located within the City of Chicago.

We furnish the Glidden Company about a dozen trucks. When those trucks go to the Glidden Company they pick up articles at the Glidden Company and those articles are transported in part to points in the City of Chicago.

I don't know how much of that trucking service is local, interstate or intrastate. The Willett Company is paid by the truck and by the day, and some charges are by the hundred weight and by the mile. Our Company does not keep any record to determine the proportion of interstate as compared to intrastate and local operations. The same type of service we render the Glidden Company is rendered to all the other concerns that I mentioned.

As far as the entire operations of the Willett Company are concerned, there is no way in which we can determine the proportion of local transportation as compared to interstate and intrastate. The operations I have described are the same as on the first of March, 1949.

Redirect examination.

By Mr. Lynch:

Q. Now, Mr. Willett, state for example, that the Glidden Company—let's take one truck—It is possible in that operation, is it not, that a vehicle operating out of the Glidden Company may have on it in total load intrastate, interstate, and inter-city; is that correct?

A. That is correct.

[fol. 21] Q. And for the Pennsylvania Railroad, one of the customers that you have listed here, that would be freight that is picked up from the railroad that would be interstate and delivered in and about the City of Chicago?

A. That is true.

Q. And also you pick up freight, would you not, in and about the City of Chicago for the Pennsylvania Railroad for places and points destined outside of the City of Chicago and the State of Illinois?

A. That is true.

Mr. Lynch: That is all if the court please.

Mr. Peters: No further cross.

(Which is all the testimony heard in the above entitled cause.)

Certificate of the trial judge that the Report of Proceeding is full, true and correct and ordering that same be filed.

Stipulation that original Report of Proceedings be incorporated by the Clerk of the Municipal Court in the transcript of the record.

Order entered August 2, 1949, granting leave to file amended Complaint *nunc pro tunc* as of July 7, 1949.

In Municipal Court of Chicago

Amended Complaint nunc pro tunc

Amended Complaint filed *nunc pro tunc* as of July 7, 1949, which, omitting the caption, signatures, and verification, is in words and figures as follows:

> William T. Prendergast being first duly sworn, on oath, on information and belief, deposes and says, that The Willett Company, an Illinois corporation, heretofore, to wit, on the 1st day of March, 1949, at the City of Chicago, did then and there violate the Municipal Code of Chicago, to wit:
>
> [fols. 22-23] 1. That the defendant, The Willett Company, an Illinois Corporation, did engage in the business and occupation of transporting and conveying bundles, parcels, furniture, trunks, baggage, goods, wares, merchandise, produce or other articles by motor truck within the City of Chicago for hire or reward.
>
> 2. That said defendant violated Chapter 163 of the Municipal Code of Chicago and particularly Sec. 163-2 thereof, in that said defendant failed to pay the annual license tax for the year 1949 as provided by Sec. 163-2.
>
> In violation of Chapter 163 of the Municipal Code of Chicago.

Certificate of the Clerk of the Municipal Court of Chicago, August 16, 1949, certifying that the foregoing is a true, perfect and complete transcript of the record as per Praecipe and Stipulation.

> Respectfully submitted, Benjamin S. Adamowski, Corporation Counsel of the City of Chicago, 511 City Hall, Chicago 2, Illinois, Attorney for Appellant; L. Louis Karton, Head of Appeals and Review Division; Louis H. Geiman, Marvin J. Peters, Assistant Corporation Counsel, Of Counsel.

[fol. 23a] IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1949

CITY OF CHICAGO, a Municipal Corporation, Appellant,

vs.

THE WILLETT COMPANY, an Illinois Corporation, Appellee.

Appeal from Municipal Court of Chicago. Honorable R. P. Drymalski, Judge Presiding

EXCERPTS FROM BRIEF AND ARGUMENT FOR APPELLANT—Filed December 20, 1949

[fol. 23b] (4) The issues and the Decision Thereon

The trial court made no specific findings of fact nor held any specific conclusions of law, but simply entered a general finding of "not guilty" in favor of the defendant (Abst. 2), and entered final judgment upon said finding that the plaintiff take nothing by its action and that the defendant be discharged (Abst. 2). Consequently, it is impossible to determine the precise grounds of the trial court's determination. However, some clue is afforded by the express reservation in the stipulation on the part of the defendant of the right to object to the ordinance on the ground that it was void and of no legal effect because in conflict with the Federal and State Constitutions, with Section 23-51 of the Revised Cities and Villages Act, and with the provisions of the Illinois Truck Act (Abst. 5). Further, the defend-
[fol. 24] ant, in its brief filed in the trial court, asserted specifically (1) that the City of Chicago was without statutory power to pass the ordinance in question; (2) that even if it ever had such power, it was withdrawn by the provisions of the Illinois Truck Act; and (3) that the ordinance was in any event invalid as an interference with and a burden upon interstate commerce, and thus violative of the commerce clause of the Constitution of the United States. It is manifes therefore, that the judgment in favor of the defendant was necessarily based upon the trial court's conclusion that the ordinance was invalid and unenforceable on any or all of the grounds just enumerated.

The city, as the appellant herein, must necessarily assume that the trial court has determined all of the aforementioned issues against it, and hence we shall seek to demon-

strate herein that the trial court's decision was erroneous and should be overturned in respect of each and every such determination.

Errors Relied upon for Reversal

(1) The trial court erred in admitting, over plaintiff's objection, incompetent, irrelevant and immaterial evidence offered on behalf of the defendant.

(2) The trial court erred in finding the defendant not guilty.

(3) The finding of not guilty was against the law and the evidence.

(4) The trial court erred in entering judgment against the plaintiff and in favor of the defendant, and in ordering defendant discharged.

[fol. 25] (5) The judgment of the trial court was against the law and the evidence.

(6) The trial court erred in holding as a matter of law that the ordinance in question was in violation of the commerce clause of the Federal Constitution as an interference with or a burden upon interstate commerce.

(7) The trial court erred in holding as a matter of law that the ordinance was in violation of the Illinois Constitution with respect to the exercise by the City of Chicago of the taxing power.

(8) The trial court erred in holding as a matter of law that the enactment of the ordinance in question was beyond the power granted to the City of Chicago by Section 23-51 of the Revised Cities and Villages Act.

(9) The trial court erred in holding as a matter of law that the enactment of the ordinance in question was beyond the power of the City of Chicago on the ground that such power was withdrawn by the Illinois Truck Act.

(10) The trial court erred in holding as a matter of law that the enactment of the ordinance in question was beyond the power of the City of Chicago on the ground that such power was withdrawn by the Federal Motor Carrier Act of 1935.

[fol. 26] Points and Authorities

I

The ordinance here involved neither purports nor attempts to tax cartage operations extending beyond the corporate limits of the City of Chicago, but by its terms is confined solely to transportation "within the city", which, by well-settled definition, means from points within the city to other points within the city.

[fol. 27] II

The fact that the defendant company is also engaged in interstate commerce does not destroy the power of the City of Chicago to impose an occupation tax upon the defendant with respect to the intracity operations in which the defendant is admittedly engaged; and, in view of the express limitation of the ordinance to "Within the city" operations, the contention that it violates the commerce clause of the Federal Constitution is without foundation.

[fol. 28] III

The express limitation of the ordinance to intracity operations not only demonstrates its inherent validity, but also refutes the argument of "nonseparability" advanced by the defendant. Moreover, a showing of "nonseparability", without proof of "undue burden", will not invalidate an ordinance, limited to local business, as an infringement upon the federal commerce power.

IV

The Federal Motor Carrier Act of 1935 regulating interstate motor transportation did not withdraw from the several states or their municipalities the power of taxation or regulation of intrastate motor transportation.

Section 302 (b) of Federal Motor Carrier Act of 1935 (49 U. S. C. A., Section 302 (b)).

Tucker v. *Casualty Reciprocal Exchange* (D. C. Ga.), 40 Fed. Supp. 383.

Eichholz v. *Hargus* (D. C. Mo.), 23 Fed. Supp. 587.

[fol. 29]

V

The express statutory power of Illinois municipalities to tax and license carters was not affected or impaired either by the enactment of the Illinois Truck Act of 1939 or of the Illinois Public Utilities Act.

[fols. 30-78]

VI

The fact that the defendant company pays a city vehicle tax on its trucks for the privilege of using the city streets does not affect the city's power to levy an occupation tax upon the defendant with respect to its use of the same vehicles in its intracity freight trucking operations.

VII

The ordinance herein represents a proper exercise by the City of Chicago of the statutory power granted to municipalities to levy an occupation tax upon carters, and is in all respects valid and constitutional.

(a) Ordinances enacted pursuant to an express grant of power are presumed to be valid.

[fol. 79] In the Supreme Court of Illinois, November Term, A. D. 1949

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago. Honorable R. P. Drymalski, Judge, Presiding

Excerpts from Brief and Argument for Appellee—Filed March 13, 1950

[fol. 80] Defendant's Theory of the Case

It is the Defendant's contention that:—

1. The ordinance defining a "cart" and "carter" does not limit the carriage of freight and merchandise to transportation where both the point of origin and point of desti-

nation of freight is in the corporate limits of the City of Chicago.

2. The intrastate, interstate and local operation of the defendant cannot be separated and the ordinance is therefore in violation of the commerce clause of the Federal Constitution and the Federal Interstate Commerce Act.

3. The Carters Act of the City of Chicago taxes an instrument of interstate commerce and constituted an infringement upon the commerce powers of the Federal Government and the Federal Motor Carrier Act.

[fol. 81] 4. The City of Chicago is without statutory power to tax motor carriers without regulating them and prescribing their compensation under the power granted in the Cities and Villages Act.

5. The ordinance of the City of Chicago taxing Carters is a subterfuge revenue measure to tax personal property contrary to law.

6. The Cartage Ordinance of the City of Chicago places an undue burden upon interstate commerce and an instrumentality of interstate commerce.

7. The Illinois Truck Act repeals the power of the city to tax, license and regulate the business of "Carters."

8. The ordinance is not uniform as to all Carters.

[fol. 82] Points and Authorities

I

The phrase "within the city" does not limit the operation of the Ordinance to transportation where both the point of origin and the point of destination are in the city.

II

The "Carter's Ordinance" constitutes an interference with, and a burden on Interstate Commerce in violation of the Federal Constitution.

III

The "Carter's Ordinance" is in violation of the Constitution of 1870 in that it is not uniform as to the class upon which it operates.

[fols. 83-108] IV

The Ordinance is beyond the grant of power authorized by the Cities and Villages Act.

V

The Illinois Truck Act repealed the right of the City to tax, license and regulate the business of Carters.

[fol. 109] In the Supreme Court of Illinois, November Term, A. D. 1949

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago. Honorable R. P. Drymalski, Judge, Presiding

Excerpts from Reply Brief for Appellant—Filed March 18, 1950

[fols. 110-111] I

Since the ordinance is suspectible of a proper and reasonable construction which will render it valid, defendant's insistence that it should be given an unconstitutional construction is unwarranted.

[fol. 112] II

Being confined to purely intracity cartage, the ordinance here neither interferes with nor burdens interstate commerce. Nor is defendant's claim of inseparability between its intracity, intercity and interstate operations to any extent sustained by the evidence.

[fol. 113] However, the defendant cannot insist on continuing in the intracity cartage business and still refuse to [fol. 114] pay the occupation tax levied by the city ordinance upon such business. Nor can it escape such tax by the simple device of using the same vehicles indiscriminately for intracity, intercity and interstate business, and then claiming that it cannot unscramble or disassociate one type of business from the other, without offering any evidence that it cannot, or that it even attempted to do so.

Moreover, inseparability alone is not enough to invalidate a local revenue measure. There must be shown, in addition, that the imposition of the tax actually results in an

undue burden upon interstate commerce. In this connection we quote from *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission,* 297 U. S. 403, (pp. 415-16):

> "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable."

In other words, even a showing of inseparability, without proof that it actually imposes an undue burden upon interstate commerce, is not sufficient. Certainly, a mere claim of inseparability is not enough. And it is not even claimed, much less shown, that the small license fee imposed by the ordinance is either unreasonable, burdensome, oppressive or confiscatory.

[fol. 115] III

The carters ordinance satisfies the constitutional requirement of uniformity as to the class upon which it operates.

[fol. 116] IV

The ordinance is within the express grant of statutory power to municipalities "to license, tax, and regulate * * * carters * * * and to prescribe their compensation."

[fol. 117] V

The Illinois Truck Act of 1939 did not repeal the right of the City to tax the occupation of carters.

[fols. 118-119] In Supreme Court of Illinois

Argument and Submission—March 21, 1950

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of

counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Arthur Magid for appellant and by C. D. Snewind for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 120] IN SUPREME COURT OF ILLINOIS

Docket No. 31312—Agenda 16—March, 1950

The City of Chicago, Appellant, v. The Willett Company, Appellee.

OPINION—May 18, 1950

Mr. JUSTICE FULTON delivered the opinion of the court:

This cause is heard here on direct appeal from a judgment of the municipal court of Chicago, finding the Willett Company, hereinafter referred to as defendant, not guilty in an action brought by the city of Chicago, which charged said defendant with engaging in the business of a carter within the city of Chicago without first having obtained or paid for a license therefor, in violation of chapter 163, Municipal Code of Chicago.

The cause was heard by the court without a jury. The parties filed a stipulation which, with certain testimony of the executive vice-president of the defendant company, constitutes the record in the cause. The trial court has certified that the validity of a municipal ordinance is involved.

Chapter 163 of the Chicago Municipal Code relates to carters and provides, in brief, that any dray type of vehicle driven or employed for the purpose of transporting or conveying property and merchandise within the city for hire or reward shall be deemed a cart within the meaning of the chapter, whether the vehicle be employed or hired from any

public stand, public way, barn, garage, office or other place, or whether it be hired for the day, week, month or year. A license tax is imposed by the ordinance for each cart operated or controlled by every carter according to established fees and schedules.

The foregoing section as passed repeals the prior public carters ordinance as well as the furniture movers ordinance.

The defendant is an Illinois corporation, with its offices in Chicago, and was engaged in the business of transporting property by motor vehicles for hire in the city of Chicago. It operates as a contract carrier of commodities by motor vehicle from points and places within the State of Illinois, to points and places in the States of Indiana and Wisconsin. It further carries property within the city of Chicago from point to point under contract with various firms and other interstate and intrastate carriers entering the city. It holds itself out to serve the public and connecting carriers and forwarding companies generally up to the limit of its capacity, either (a) by leasing trucks with drivers to shippers by the hour, day, week or year or other period, (b) by making contracts with shippers to perform [fol. 121] all trucking for a fixed period, (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit, (d) by distributing pooling cars, and (e) by rendering collection and delivery service, station or substation service, for rail, water and highway motor carriers and forwarding companies, either under contract or on some other basis. It was further stipulated that the motor vehicles operated by the defendant company in the course of a day's business would transport property from points within the city of Chicago to other points within the city of Chicago, from points within the city of Chicago to other points within the State of Illinois outside the city and from points in Chicago to other States surrounding Illinois and return. The defendant did not comply with the provisions of the carters ordinance, arguing that the ordinance was void and of no legal effect because it is in conflict with the constitution of the United States; it is in conflict with the constitution of Illinois; it is in conflict with section 23-51 of the Revised Cities and Villages Act; and it is in conflict with the Illinois Truck Act of 1939, as amended.

The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago.

The argument of the city of Chicago, the appellant here, is to the effect that by the terms of the ordinance, the license fee is restricted to carters doing business "within the city" and that the natural meaning of those words restricts the ordinance to intracity business and it cannot apply to interstate commerce. In support of this construction, appellant cites *Pacific Express Company* v. *Seibert,* 142 U. S. 339, and related cases. It further argues that the mere fact that the defendant company is engaged in interstate commerce, as well as intrastate and intracity, does not prevent the city of Chicago from imposing an occupation tax upon the defendant with respect to the purely intracity operations in which the defendant is admittedly engaged. To support this view, they cite cases such as *Osborne* v. *Florida,* 164 U. S. 650, *Pullman Co.* v. *Adams,* 189 U. S. 420, and like cases.

The defendant, on the other hand, cites *People* v. *Hor-*
[fol. 122] *ton Motor Lines,* 281 N. Y. 196; *Northern Pacific Railway Co.* v. *Washington,* 222 U. S. 370, and *Sprout* v. *South Bend,* 277 U. S. 166, and similar cases for the proposition that the State or municipality cannot tax interstate commerce and, in situations such as the one before the court, the tax violates the constitution of the United States and imposes a burden on interstate commerce. Both parties further argue as to the validity and invalidity of the ordinance in question.

It is the law in this State that this court will give a construction to a statute which will uphold its validity. The presumption is always in favor of the validity of an ordinance passed in pursuance of statutory authority. *City of Chicago* v. *Hebard Express and Van Co.,* 301 Ill. 570.

It seems clear that the ordinance in question is not invalid by its terms, but could be held to be so by reason of its application to certain operators of carts, under the definition of the ordinance, in and around the city of Chicago. In other words, the ordinance is not invalid *per se.* It is only upon its application that a question of its constitutionality can arise. In *Pacific Express Co.* v. *Seibert,*

142 U. S. 339, it was said, " 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce." Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sense.

As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business. In *Osborne* v. *Florida,* 164 U. S. 650, a Florida statute was involved, imposing an annual license tax on all express companies doing business in the State. The Supreme Court of Florida has construed the statute as not applying to interstate business, but only to local business, intrastate in character. The Supreme Court of Florida held the statute to be valid and the United States Supreme Court affirmed this holding, pointing out that the construction of the statute by the Supreme Court of Florida, as applying only to intrastate business, was binding upon it and would be accepted by it. The case is authority for [fol. 123] the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character.

However, the mere operation of trucks by the defendant "within the city" is not sufficient to determine the issues here. The legal effect of such operation must be considered.

As we have previously stated, the question here is one of application of the ordinance to the practical aspects of the hauling done by the defendant. In addition to arguing that the statute itself provides only for taxation upon persons transporting property "within the city" and that this deals only with intrastate business, the city of Chicago admits that where the intracity and interstate operations are inseparable, and the defendant cannot separate the two, nor continue to engage in business if separation is attempted, the argument as to the tax being a burden upon interstate commerce might apply.

It is only when a separation, in fact, of intrastate and interstate business exists that a like separation may be recognized between the control of the State and that of the nation. (See *Osborne* v. *Florida*, 164 U. S. 650, and *Pullman Co.* v. *Adams*, 189 U. S. 420.) The city argues, however, that no inseparability has been shown and that the defendant has not met the burden of proof in this regard. The burden is on him who asserts that, although actually within, the traffic is legally outside the State; unless the interstate character is established, locality determines the question of jurisdiction. *Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21.

The only evidence in this record is that of Howard L. Willett, Jr., who is the executive vice-president of the defendant company, and who stated on the stand that his company engaged in interstate, intrastate and local freight in the city of Chicago. It is not clear from the testimony or the questions asked of Willett whether or not he was familiar with the legal meaning of the term "intercity freight." It is apparent that the Willett Company operates from Chicago to surrounding States and in that manner engages in interstate commerce. They also engage as a contract carrier with other carriers coming into the city of Chicago from outside the State of Illinois. Whether or not by intercity operation Willett meant only that his trucks operated within the city of Chicago is another thing. The [fol. 124] record is silent on that point.

He did testify that it was not possible to separate the intrastate freight from the interstate freight and the intercity freight hauled by the defendant. He further stated that defendant could not keep records of the shipments it made each day within the city of Chicago as to interstate, intracity or intrastate character.

It appears, insofar as we can ascertain from this record, that the defendant herein operates its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the city of Chicago. The defendant itself does not determine what articles it shall carry on its trucks, but carries articles of all kinds, in interstate, intrastate and intracity traffic. It has no basis for differentiating between the shipments which it carries on its trucks, but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every

load the three types of property are so intermingled as to be impossible of separation. It is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a carter's ordinance. The defendant does not keep records of the shipments because he does not handle the shipments as such. He does not go from house to house picking up shipments for delivery within the city of Chicago, but his entire business is concerned with hauling under contract for various firms, enterprises and other contract carriers in the city of Chicago.

The cross-examination by the city of Chicago did not counteract the statements of this witness, and his statements as to nonseparability remained unchallenged in the record. All of the trucks, over 1200 of them, are engaged in the type of work which has been described. It was evident that the type of contracts the defendant has with other companies deal mainly with other carriers. The defendant has contracts with the Pennsylvania Railroad, Acme Fast Freight, Air Cargo, Ryerson Steel, U. S. Steel, Youngstown Steel, H. J. Heinz Company, Standard Brands Company, Glidden Company and others of that nature. All of these companies have either offices or plants in the city of Chicago.

On cross-examination the witness testified that insofar as the operations of the defendant were concerned, there was no possible way in which they could determine the proportion of local transportation as compared to intra-[fol. 125] state and interstate, but he did state that in all the operations, every truck had some of all types of freight on it.

In view of the uncontradicted testimony in the record, it would appear that the defendant is not able to separate its intracity business from its interstate business, nor can it keep records of such business, nor can it continue in any one of the operations without giving up its entire business. In other words, it needs all of its business to keep in operation.

In *Pullman Co.* v. *Adams,* 189 U. S. 420, a Mississippi statute was involved, imposing a privilege tax on each sleeping-car company carrying passengers from one point to another within the State. The proof showed that the defendant company carried passengers into Mississippi

from points outside the State, or out of Mississippi from points within the State, but that the same cars also carried passengers from point to point within the State. It was contended that the tax was invalid as a burden upon interstate commerce. The United States Supreme Court affirmed the judgment of the State court, holding the tax valid, saying that the defendant had the right to choose between what points it would carry persons, and, therefore, the right to give up the carriage of passengers from one point to another within the State. The court further said, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The distinguishing factor in that case and in the situation before us is that the record is clear and uncontroverted that the defendant herein is not free to renounce. The record is uncontradicted that the defendant cannot engage in any one portion of its business without the other.

In *Sprout* v. *South Bend*, 277 U. S. 166, the Supreme Court of the United States, considering an ordinance of the city of South Bend imposing a license on motor busses, stated, "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business." The evidence in the instant cause makes this language applicable to the case here.

The case is similar in some respects to *People* v. *Horton* [fol. 126] *Motor Lines, Inc.*, 281 N. Y. 196, 22 N. E. 2d 338. That case involved an interstate motor carrier which operated a fleet of trucks within the city of New York to deliver and pick up freight to and from its New York terminal or to other shippers within the city. The question involved was whether the public carters ordinance could be applied to the defendant's small trucks which engaged primarily in interstate commerce, although all operated "within the city." In determining that the defendant was not subject to the carters ordinance, the court cited *Northern Pacific Railway Co.* v. *Washington ex rel. Atkinson*, 222 U. S. 370. In that case it was said, "The train, although moving from

one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia, as well as in carrying merchandise which had originated outside the State and was in transit through the State to a foreign destination. This transportation was interstate commerce, and the train was an interstate train."

The language of this last cited case is applicable here. While the defendant may have intracity loads in part upon its trucks, it is clear that every load combines intrastate and interstate property as well. The incidental carrying of loads within the city does not make the defendant subject to the license tax here. The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question.

Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee. For the reasons stated herein, the judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

Thompson, C. J., and Crampton, J., dissenting.

[fols. 127-128] In Supreme Court of Illinois

No. 31312

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois Corporation, Appellee

Judgment—May 18, 1950

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the

record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Municipal Court of the City of Chicago aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, in due course of law.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 27th day of September, 1950.

(S.) Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois. (Seal.)

[fol. 129] In the Supreme Court of Illinois, November Term, A. D. 1949

City of Chicago, a Municipal Corporation, Appellant,

vs.

The Willett Company, an Illinois Corporation, Appellee

Appeal from Municipal Court of Chicago. Honorable R. P. Drymalski, Judge Presiding

Excerpts from Petition for Rehearing—Filed June 7, 1950

[fol. 130] 5

The opinion (pp. 5-6) treats the fact that appellee also carried freight for interstate shippers and railroads upon the same trucks that it carried purely intracity shipments as showing nonseparability between the two types of commerce.

[fol. 131] 9

Another controlling point which the court overlooked is that proof of nonseparability alone is insufficient to prevent application of the ordinance to appellee; it must further be shown that the tax levied by the ordinance does in fact impose an undue burden upon appellee's interstate business.

[fols. 132-133] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER DENYING REHEARING—September 18, 1950

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

[fol. 134] IN THE SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1949

[Title omitted]

NOTICE OF MOTION

To: Daley & Lynch, Rm. 1631, 33 N. LaSalle St., Chicago, Illinois, Attorney for Appellee:

Kindly take notice that we shall file with the Clerk of the Supreme Court in the above entitled cause for due presentation to the said court, our Petition to Recall and Stay the Mandate issued by said court on the judgment of affirmance entered in this cause, pending the final disposition by the Supreme Court of the United States of a petition for a writ of certiorari which we intend to file in due course to obtain a review by the Supreme Court of the United States of the said judgment of affirmance entered by the Supreme Court of Illinois in the above entitled cause; and that we shall further file with the Clerk of the Supreme Court of Illinois a certain Praecipe for Record;

copies of which Petition and Praecipe are hereto attached and herewith served upon you.

(s) John J. Mortimer, Acting Corporation Counsel of the City of Chicago, 511 City Hall, Chicago 2, Illinois.

Received a copy of the above and foregoing Notice, together with copies of the Petition and Praecipe therein referred to, this —— day of November 1950

—— ——, Attorney for Appellee.

[fol. 135] IN THE SUPREME COURT OF ILLINOIS,
NOVEMBER TERM, A. D. 1949

[Title omitted]

PETITION FOR RECALL AND STAY OF MANDATE PENDING DISPOSITION OF PETITION TO UNITED STATES SUPREME COURT FOR WRIT OF CERTIORARI—Filed November 29, 1950

Now comes City of Chicago, a municipal corporation, appellant in the above entitled cause, by John J. Mortimer, Acting Corporation Counsel of the City of Chicago, its attorney, and represents unto this Honorable Court as follows:

1. That on May 18, 1950, this court rendered its decision and filed its opinion in the above cause, affirming the judgment of the Municipal Court of Chicago, and holding that Chapter 163, Municipal Code of Chicago (otherwise known as the Carters Ordinance) was violative of the commerce clause of the Federal Constitution, and was therefore void as applied to appellee's business.

2. That on September 18, 1950, this court denied appellant's petition for a rehearing.

3. That, thereafter, the mandate of this court duly issued on said judgment of affirmance.

4. That appellant intends to file in due course a Petition in the Supreme Court of the United States for a writ of certiorari to review the said judgment of this court.

[fol. 135a] 5. Wherefore, appellant prays that this court recall its said mandate heretofore issued on its said judgment as aforesaid, and that this court stay said mandate

until the final disposition by the Supreme Court of the United States of said Petition for a writ of certiorari.

City of Chicago, a municipal corporation, Appellant, by John J. Mortimer, Acting Corporation Counsel of the City of Chicago, its Attorney.

Duly sworn to by Arthur Magid, jurat omitted in printing.

[fol. 136] In Supreme Court of Illinois

[Title omitted]

Order Recalling and Staying Mandate—November 30, 1950

And now, on this day, the Court having duly considered the motion by appellant for recall of mandate, and that the same be stayed until final disposition of the writ of certiorari to be filed in the United States Supreme Court, and being now fully advised of and concerning the premises doth allow said motion.

[fol. 137] In the Supreme Court of Illinois, November Term, A. D. 1949

[Title omitted]

Praecipe for Record

To the Honorable Clerk of the Supreme Court of Illinois:

Kindly prepare and certify, for purpose of obtaining a review by the Supreme Court of the United States, the complete record in the above entitled cause, including, but not limited to, the following:

1. Abstract of Record.
2. Brief and Argument for Appellant.
3. Brief and Argument for Appellee.
4. Reply Brief for Appellant.
5. Judgment entered by this court on May 18, 1950, affirming judgment of trial court.
6. Opinion filed by this court on May 18, 1950.

7. Petition for Rehearing.
8. Order entered September 18, 1950, denying Petition for Rehearing.
9. Petition for Recall and stay of Mandate.
10. Order entered on said Petition for Recall and stay of Mandate.
[fol. 138] 11. All other proceedings had and orders entered in the above entitled cause.
12. Certificate of the clerk of this court to the complete record in this cause.

John J. Mortimer, Acting Corporation Counsel of the City of Chicago, Attorney for Appellant.

[fol. 139] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 140] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

CITY OF CHICAGO, a Municipal Corporation, Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 16", 1951.

Fred M. Vinson, Chief Justice of the United States.

Dated this 15" day of December, 1950.

[fol. 141] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1950

[Title omitted]

STIPULATION TO PRINT CERTAIN PORTIONS OF THE RECORD—Filed December 26, 1950

It is hereby stipulated by and between the parties hereto, by and through their respective attorneys, pursuant to paragraph 8 of Rule 38 of the Supreme Court of the United States, that the Printed Transcript of the Record should contain all of the matter included in the Certified Transcript of the Record, except as follows:

[fol. 142] From the "Brief and Argument for Appellant", print only the following:

(Cover Page) Print the cover page, except the names of counsel.

(Pages 10-12) Print from "(4) The Issues and the Decision Thereon", on page 10, through the end of page 12.

(Pages 13-18) Print the caption "Points and Authorities", on page 13, and all the main headings (Points I to VII, both inclusive, on pages 13 to 18). Omit all sub-headings and all the citations.

From the "Brief and Argument for Appellee", print only the following:

(Cover Page) Print the cover page, except the names of counsel.

(Pages 3-4) Print from "Defendant's Theory of the Case", on page 3, through the end of page 4.

(Pages 5-6) Print the caption "Points and Authorities," on page 5, and all the main headings (Points I to V, both inclusive, on pages 5 and 6). Omit all the citations.

From the "Reply Brief for Appellant", print only the following:

(Cover Page) Print the cover page, except the names of counsel.

(Page 2) Print the heading appearing in bold face type on page 2.

(Page 6) Print the heading appearing in bold face type on page 6.

[fol. 143] (Pages 12-13) Print from the last incomplete paragraph on page 12, beginning with the word "However", through to the end of the next to the last paragraph on page 13, ending with the word "confiscatory".

(Pages 14, 18 and 20) Print the headings appearing in bold face type on pages 14, 18 and 20.

From the "Petition for Rehearing", print only the following:

(Cover Page) Print the cover page, except the names of counsel.

(Page 4) "The opinion (pp. 5-6) treats the fact that appellee also carried freight for interstate shippers and railroads upon the same trucks that it carried purely intracity shipments as showing nonseparability between the two types of commerce."

(Page 7) "Another controlling point which the court overlooked is that proof of nonseparability alone is insufficient to prevent application of the ordinance to appellee; it must further be shown that the tax levied by the ordinance does in fact impose an undue burden upon appellee's interstate business."

[fols. 144-145] Except as above stated, the Certified Transcript of the Record, shall be printed in full.

John J. Mortimer, Corporation Counsel of the City of Chicago, a Municipal Corporation; L. Louis Karton, Head of Appeals and Review Division, Assistant Corporation Counsel; Arthur Magid, Assistant Corporation Counsel, 511 City Hall, Chicago 2, Illinois, Attorneys for the Petitioner. Richard J. Daley, By Charles D. Snewind; William J. Lynch, Jr., By Charles D. Snewind; Charles D. Snewind, Attorneys for the Respondent.

Office-Supreme Court, U. S.
FILED
JAN 12 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 493

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

JOHN J. MORTIMER,
Corporation Counsel of the
City of Chicago,

L. LOUIS KARTON,
Head of Appeals and
Review Division,

ARTHUR MAGID,
Assistant Corporation Counsel,
Room 511, City Hall,
Chicago 2, Illinois,
Attorneys for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No.

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

City of Chicago, a Municipal Corporation, petitioner herein, prays that a writ of ceriorari issue to review the final judgment of the Supreme Court of Illinois entered May 18, 1950 (R. 29). A timely petition for rehearing was filed on June 7, 1950 (R. 30) and was denied on September 18, 1950 (R. 31). This court, on December 15, 1950, granted petitioner's motion to extend the time for filing the petition for a writ of certiorari to and including January 16, 1951 (R. 34).

Opinion Below.

The opinion of the Supreme Court of Illinois (two Justices dissenting) is included in the Printed Transcript of the Record (R. 22-29); is set forth in full in Appendix A hereto, pp. 21-30; and is officially reported in 406 Ill. 286.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner seeks a review of the final judgment of the Supreme Court of Illinois (R. 29) holding unenforceable as against respondent corporation, on the sole ground of its being obnoxious to the commerce clause of the Federal Constitution (R. 29), an ordinance of the City of Chicago levying an occupation tax upon all persons engaged in the transportation of freight by horse-drawn or automotive vehicle for hire or reward within the city (R. 5-7). The amount of the tax ranged, for horse-drawn vehicles, from a minimum of $2.75 annually for each one-horse vehicle to a maximum of $13.75 annually for each six-horse vehicle, and, for automotive vehicles, from a minimum of $8.25 annually for each vehicle of not more than two-ton capacity to a maximum of $16.50 annually for each vehicle exceeding six-ton capacity, and was imposed in respect of each vehicle used or operated in such "within the city" transportation (R. 6).

The ordinance in question is Chapter 163 of the Municipal Code of Chicago, and was enacted by the City Council of the City of Chicago on January 14, 1949 (R. 5-7). Its official text may be found in the Journal of the Proceedings of the City Council of the City of Chicago, Illinois, for January 14, 1949, at page 3679, and its provisions are also set forth *verbatim* in Appendix B hereto, pp. 30-32.

Respondent corporation transports freight by motor vehicle both in interstate and intrastate commerce. Its intrastate operations include both intercity transportation (*i.e.*, to and from points within the City of Chicago to points outside the city but within the state), and intracity transportation (*i.e.*, where the points of origin and destination

are both within the corporate limits of the City of Chicago (R. 8). Respondent refused to comply with the ordinance (R. 8), and petitioner instituted a quasi-criminal action in the Municipal Court of Chicago, charging respondent with engaging in the intracity transportation of freight by motor vehicle without a license, in violation of the ordinance (R. 1). A jury was waived (R. 2), and, upon a trial of the issues by the court without a jury, the respondent was found not guilty and ordered discharged (R. 2). The trial judge certified that the validity of a municipal ordinance was involved (R. 2-3), and a direct appeal was taken by the City of Chicago to the Supreme Court of Illinois (R. 3).

Although the Supreme Court of Illinois construed the ordinance, and the tax prescribed thereby, as limited to purely intracity transportation (R. 25), it nevertheless held the ordinance unenforceable as an impermissible interference with the Federal commerce power on the sole ground that respondent's interstate and intrastate (including intracity) operations were inseparable (R. 29). Inseparability was held to have been established by a showing that respondent's vehicles carried mixed loads (*i.e.*, that the same vehicles carried both interstate and intrastate packages and parcels at the same time for the same or different shippers), and that respondent did not keep separate records of its interstate and intrastate operations or of its respective revenues therefrom (R. 23, 26-27, 29).

Moreover, this factor of "inseparability" was held sufficient, without more, to render the ordinance violative of the commerce clause of the Constitution of the United States, although there was no showing whatever that the tax levied by the ordinance would or did in practical effect impose an undue burden upon respondent's interstate operations (R. 29). Inasmuch as the Supreme Court of Illinois recognized that the burden of proving invalidity of

the ordinance under the commerce clause was upon the respondent (R. 26),—and this is, indeed, the true rule (*Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21, 27; 48 L. Ed. 325),— the decision of the Supreme Court of Illinois is tantamount to a holding that a showing of undue burden in fact either is not required or flows inexorably from a mere showing of inseparability. This, we respectfully submit, constitutes an erroneous ruling upon an important and substantial Federal question, and brings this case within the certiorari jurisdiction of this court.

JURISDICTIONAL STATEMENT.

Subdivision (3) of Section 1257 of Title 28, Judiciary and Judicial Procedure, is relied upon as giving jurisdiction to the Supreme Court of the United States to review the final judgment of the Supreme Court of Illinois in this cause. It reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • •
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." (U. S.,C. A., Title 28, Sec. 1257 (3).)

A municipal ordinance has been held to be a "State statute" within former Section 344 of Title 28, from which the foregoing provision is derived. (*Jamison* v. *Texas*, 318

U. S. 413, 414; 87 L. Ed. 869; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 102-114; 72 L. Ed. 801.)

It appears clearly from the opinion of the Supreme Court of Illinois (R. 29), that the final judgment of that court (R. 29) was based upon its holding that the ordinance in question violated the commerce clause of the Federal Constitution and was, therefore, invalid and unenforceable as against the respondent. The opinion declares expressly that, in view of the decision on the interstate commerce question, "it is not necessary to consider the other arguments made" (R. 29).

The case arose upon the filing of a quasi-criminal complaint by the city of Chicago in the Municipal Court of Chicago charging the respondent with engaging in the occupation of transporting freight by motor vehicle within the city without having first obtained or paid for a license, in violation of Chapter 163, Municipal Code of Chicago, which is the ordinance involved (R. 1, 14). The cause was heard by the trial court without a jury (R. 2). The parties filed a stipulation (R. 4-10) which, with certain oral testimony of the executive vice president of the respondent company (R. 11-13), constitutes the entire evidence in the case.

As appears from the evidence, the respondent company operates about 1,200 motor vehicles in the transportation of freight in interstate and intrastate (including intracity) commerce (R. 12). It does not use any horse-drawn vehicles in the conduct of its business (R. 8). It operates as a contract carrier of commodities, and serves shippers, connecting carriers and forwarding companies either (a) by leasing its trucks with drivers to shippers by the hour, day, week or year, or other period; (b) by making contracts with shippers to perform all trucking for a fixed period; (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred

pounds, per ton, per piece, or other unit; (d) by distributing pooling cars; and (e) by rendering collection and delivery service, station or substation service for rail, water and highway motor carriers and forwarding companies either under contract or on some other basis (R. 7).

The stipulation also contains the express recital that each vehicle of the respondent, during every single day of the year, carries on it, along with property which never leaves the city, property destined to points outside the city but within the state, as well as property destined to points outside the State (R. 9).

It was further expressly stipulated that the respondent company had not complied with the provisions of the City ordinance in question, and had not secured licenses as provided therein (R. 8). The stipulation also contains an express reservation by the respondent to object to the ordinance "on the ground that said Ordinance is void and of no legal effect because it is in conflict with the Constitution of the United States" (R. 4).

The executive vice president of respondent company testified that he did not know how much of respondent's operations were interstate, intrastate or intracity; that the company did not keep any records to determine the proportion of interstate as compared to intrastate and intracity operations; and that as far as the entire operations of the company were concerned, there was no way in which it could determine the proportion of intracity as compared to interstate and intrastate transportation (R. 12-13).

The same witness also testified that his company was not able to separate its interstate, intrastate and intracity operations; that it could not 'without considerable hardship" withdraw from its interstate business and continue in its intrastate business; and that its interstate, intrastate and intracity business was not divisible (R. 11).

On the foregoing record, the trial court found the defendant not guilty (R. 2), entered final judgment on said finding (R. 2), and issued a certificate that the cause, and the final judgment therein, involved the question of the validity of a city ordinance (R. 2-3).

On direct appeal to the Supreme Court of Illinois, that court entered final judgment affirming the judgment of the trial court (R. 29-30).

In view of respondent's admitted violation of the ordinance (R. 8), and of its express reservation of right to object thereto on the ground of its invalidity and unenforceability because in conflict with the Federal Constitution (R. 4), it follows that the trial court, in finding the defendant not guilty (R. 2) and in entering final judgment on said finding (R. 2), necessarily determined that the ordinance was violative of the commerce clause of the Federal Constituion. As further evidence and clarification of the ground of its decision, the trial court issued a certificate reciting that there was involved in the cause, and in the final judgment therein, the validity of a municipal ordinance (R. 2-3).

The Supreme Court of Illinois took a similar view of the basis of the trial court's decision, saying:

> "The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago" (R. 24).

In the Brief and Argument for Appellant, filed in the Supreme Court of Illinois, petitioner urged, among other errors, the following:

> "(6) The trial court erred in holding as a matter of law that the ordinance in question was in vio-

lation of the commerce clause of the Federal Constitution as an interference with or a burden upon interstate commerce" (R. 16).

In the Brief and Argument for Appellee, respondent contended in the Supreme Court of Illinois (a) that the intrastate, interstate and local operations of the respondent "cannot be separated and the ordinance is therefore in violation of the commerce clause of the Federal Constitution" (R. 19), and (b) that the ordinance in question "constitutes an interference with, and a burden upon Interstate Commerce in violation of the Federal Constitution" (R. 19).

In its Reply Brief, petitioner urged that the ordinance, being confined to purely intracity transportation, neither interfered with nor burdened interstate commerce (R. 20), and, further, that a showing of inseparability between the interstate and intrastate operations of respondent was not sufficient to establish invalidity of the ordinance under the commerce clause of the Federal Constitution without a showing also that the imposition of the tax under the ordinance actually resulted in an undue burden upon respondent's interstate operations (R. 20-21).

In its Petition for Rehearing, petitioner expressly pointed out that the Supreme Court of Illinois had found inseparability to exist upon a mere showing of "mixed loads" (R. 30), and, further, had overlooked the controlling point that proof of inseparability, without more, was insufficient to invalidate the ordinance as violative of the commerce clause of the Federal Constitution, and that its decision was erroneous because there was no proof or even any attempt to show that the tax levied by the ordinance did in fact impose an undue burden upon respondent's interstate business (R. 31).

Thus, we respectfully suggest, it is quite clear that the question of the validity of the ordinance in question under the commerce clause of the Federal Constitution was squarely involved in the cause, was passed upon by the trial court and by the Supreme Court of Illinois, and was properly raised, presented and preserved for review throughout every stage of the proceedings, and is properly before this Court for review on petition for writ of certiorari.

The question whether or not a state taxing statute (or city ordinance) is in violation of the commerce clause of the Constitution of the United States is a Federal one, and within the review jurisdiction of this court. (*Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 21-22, 35 L. Ed. 613; *Western Union Telegraph Co.* v. *Alabama State Board of Assessment,* 132 U. S. 472, 33 L. Ed. 409).

Several cases of more recent date in which this court has assumed jurisdiction to review final judgments of state courts of last resort which have involved the question whether a state taxing statute (or city ordinance) was violative of the commerce clause of the Federal Constitution, are: (*Pacific Telephone and Telegraph Company* v. *Washington Tax Commission,* 297 U. S. 403, 80 L. Ed. 760; *Aero Mayflower Transit Co.* v. *Board of R.R. Commrs. of Montant,* 332 U. S. 495, 92 L. Ed. 99; *Central Greyhound Lines, Inc.,* v. *Mealey,* 334 U. S. 653, 92 L. Ed. 1633; *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U. S. 662, 93 L. Ed. 1613; *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542, 94 L. Ed. 733).

In *Brotherhood of Railroad Trainmen, et al.,* v. *Terminal Railroad Association of St. Louis,* 379 Ill. 403, (affirmed in 318 U. S. 1), the Supreme Court of Illinois, said (p. 408):

> "The question whether a statute of the State or an order of the commission acting within the authority conferred upon it by the General Assembly of the

> State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter."

The jurisdiction of this court to review the judgment of the Supreme Court of Illinois in that case (which involved the question of the validity of a regulation of the Illinois Commerce Commission) was invoked and sustained in 318 U. S. 1, 87 L. Ed. 571.

That the Supreme Court of Illinois construed the ordinance as confined to local transportation and as not intending to tax interstate business (R. 25), does not dissipate the error of that court's ruling on the substantial Federal question whether the commerce clause of the Federal Constitution stands as a bar to the enforcement of the ordinance against respondent on a mere showing of inseparability without any evidence of undue burden. Nor can the court's decision properly be regarded as merely embodying a ruling on the question of the sufficiency of the evidence to establish the existence of undue burden, since evidence of inseparability constitutes no evidence of undue burden. The question of the sufficiency of the evidence does not arise upon a total failure of proof. As this court pointed out in *Pacific Telephone & Telegraph Co.* v. *Washington Tax Commission,* 297 U. S. 403, 80 L. Ed. 760, the fact that the intrastate and interstate phases of a business may be "inextricably intertwined" does not necessarily establish that a local tax upon the former casts an undue burden upon the latter.

QUESTIONS PRESENTED.

(1) Whether proof that the same vehicles carry mixed loads (interstate as well as purely local freight) for the same or different shippers at the same time, and that it is inconvenient or impracticable to allocate specific vehicles for each type of operation or to keep separate records of the interstate and intrastate phases of the business or of the revenue derived therefrom is sufficient to establish a true case of "inseparability" under the decisions of this Court.

(2) As a corollary: Can persons engaged both in interstate and intrastate transportation escape local taxation upon their intrastate operations by the simple expedient of having the same vehicles carry such mixed loads for the same or different shippers at the same time, and by failing to keep separate records of their interstate and intrastate business or of the revenue derived therefrom?

(3) Assuming a sufficient showing of impossibility or impracticability of separation between the interstate and intrastate operations of the respondent company, is such inseparability sufficient to invalidate the municipal tax upon respondent's purely local business as an undue burden upon interstate commerce, in the absence of any proof that such local tax does or will actually result in unduly burdening respondent's interstate operations?

(4) Does a flat annual charge, reasonable in amount, levied in respect of each motor vehicle used by respondent in intrastate freight transportation become an undue burden upon interstate commerce by reason of the fact that the same vehicle is also used for interstate freight transportation, in the absence of any showing as to the relation, percentagewise, between such flat annual charge and the annual operating revenue from each vehicle so taxed?

(5) Does a local tax, so reasonable in amount as not to constitute an undue burden upon interstate commerce, become obnoxious to the commerce clause of the Federal Constitution merely because such tax is in the form of a flat annual charge in respect of each vehicle used in intrastate commerce instead of measured by a percentage of the gross receipts from such local commerce?

(6) In view of a total absence of evidence of undue burden, should not the cause have been remanded for the taking of proof on that issue or, in the alternative, should not the ordinance have been accorded the presumption of validity and sustained, instead of held invalid on an inadequate record?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of the Supreme Court of Illinois that a showing of inseparability between the interstate and intrastate phases of respondent's business was sufficient to invalidate the municipal tax upon its local business as an undue burden upon interstate commerce, without any showing whatever that such local tax actually produced such a result, is not in accord with the applicable decisions of this court.

In *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. Ed. 760, this court sustained the validity of a local taxing statute as against the objection that it was obnoxious to the commerce clause of the Federal Constitution, notwithstanding that it was found that practical considerations would prevent the taxpayer from abandoning its intrastate business in order to escape the tax without also withdrawing from its interstate

business, and that its interstate and intrastate operations were "inextricably interwined" (p. 411). This court there said: "No decision of this Court lends support to the proposition that an occupational tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable" (pp. 415-416). This court further pointed out that "if it [the local tax] burdens interstate commerce at all, it does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. 'The question of constitutional validity is not to be determined by artificial standards'. * * * The alleged indirect tax must be judged by its practical operation" (p. 413). (Brackets, and words enclosed therein, supplied.)

This Court then went on to examine the evidence as to gross operating revenue from each class of business, the relation between the two, and the economic impact of the tax upon each type of operation as well as upon the taxpayer's business as a whole; concluded that no undue burden on interstate commerce was shown; and sustained the validity of the tax under the commerce clause of the Federal Constitution notwithstanding an unavoidable inseparability between the taxpayer's interstate and intrastate operations (pp. 417-420).

In the case at bar there is no evidence whatever as to respondent's gross or net annual operating revenue, whether from interstate, intrastate, or total business, either per vehicle or as a whole. Hence there is no basis in the record for the conclusion reached by the Supreme Court of Illinois that the tax prescribed by the ordinance in practical effect did or would unduly burden respondent's interstate operations.

The crucial error of the Supreme Court of Illinois in the decision here sought to be reviewed is that it held the mere fact of inseparability to be sufficient for invalidation of the ordinance under the commerce clause, without requiring any showing as to whether or not the local tax did in fact constitute an undue burden upon interstate commerce. This, we respectfully submit, is directly contrary to the decision of this Court in *Pacific Telephone and Telegraph Company* v. *Washington Tax Commission,* 297 U. S. 403, 80 L. Ed. 760.

The only material distinction between that case and the case at bar is that, there, the local taxing statute was measured by a percentage of gross receipts from intrastate operations, whereas the ordinance here involved prescribes a flat annual charge in respect of each vehicle used in intracity transportation.

The Supreme Court of Illinois, however, did not rest its decision that the ordinance was invalid under the commerce clause upon any distinction between a flat annual charge and a tax based upon gross receipts, but purely and solely upon the factor of inseparability between respondent's interstate and intrastate operations (R. 29).

There is nothing in a flat annual charge (as distinguished from a tax graduated according to gross receipts or other variable factor) which is inherently offensive to the commerce clause. This Court has frequently sustained such flat fees imposed by local law as not constituting forbidden burdens upon interstate commerce. (*Morf v. Bingaman,* 298 U. S. 407, 412, 80 L. Ed., 1245; *Aero Mayflower Transit Co.* v. *Board of R.R. Commrs. of Montana,* 332 U. S. 495, 506, 92 L. Ed. 99; *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542, 94 L. Ed. 733). These same cases likewise sustain the measure and amount of the tax prescribed by the

ordinance in question as fair and reasonable; nor, indeed, can the respondent here contend otherwise in the absence of any showing as to the relation between the amount of the annual tax and the amount of its annual revenue from local operations.

We are not unmindful of the general proposition that a state may not exact a tax for the privilege of engaging in interstate commerce, except as reasonable compensation for necessary and valuable services rendered, such as the use of state highways or other local facilities. The ordinance here involved scrupulously observes this limitation by expressly restricting its coverage to intracity operations. Hence the decisions of this Court invalidating local statutes or ordinances which attempted to impose taxes indiscriminately upon vehicles engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce, are not germane to the present inquiry.

In *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. Ed. 760, this Court distinguished *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. Ed. 833, which involved a flat annual license fee for each vehicle, on the ground that there the ordinance levied the tax indiscriminately on busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce. This Court pointed out that the license tax was held void because Sprout could not escape payment of the tax by confining himself to interstate business, since the scope of the ordinance reached even those facilities which were employed exclusively in interstate commerce (pp. 416-417).

Similarly, in two other cases involving city ordinances imposing flat annual charges upon motor freight vehicles, this Court held such local levies void under the commerce

clause as applied to vehicles engaged exclusively in making hauls, which, although intracity, constituted segments of interstate transportation, so that the tax was actually a direct impost upon interstate commerce. (*Barrett* (*Adams Express Co.*) v. *City of New York*, 232 U. S. 14, 31, 32, 34-35; *Platt* (*United States Express Co.*) v. *City of New York*, 232 U. S. 35.) Distinguishable on identical grounds is the case of *People of the State of New York* v. *The Horton Motor Lines*, 281 N. Y. 196, 22 N. E. (2d) 338, which the Supreme Court of Illinois stated was "similar in some respects" to the case at bar (R. 28).

The controlling principle which would appear to run through the decisions of this Court on this subject is that the local statute or ordinance will be upheld as valid where it is strictly confined to local business, but will be held invalid only if it applies indiscriminately to all business whether local or interstate. We are here speaking, of course, of local occupation or privilege taxes, since local taxes imposed as reasonable compensation for the use of local highways or other facilities have been upheld even where imposed directly upon interstate business. (See the chart of decisions listed in the Appendix to the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Jackson joined, in *Capital Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. Ed. 733.)

In the following cases, this Court sustained the validity of local tax legislation because strictly confined to local business. (*Osborne* v. *Florida*, 164 U. S. 650, 654, 655; 41 L. Ed. 586; *Pullman Company* v. *Adams*, 189 U. S. 420, 422; 47 L. Ed. 877; *Ewing* v. *City of Leavenworth*, 226 U. S. 464, 468-469; 57 L. Ed. 303.)

In the following cases, this Court held local tax legislation to be invalid because applying indiscriminately both to

local and interstate business. (*Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; 32 L. Ed. 311; *Crutcher* v. *Kentucky*, 141 U. S. 47; 35 L. Ed. 649; *Williams* v. *Talladega*, 226 U. S. 404, 419; 57 L. Ed. 275; *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 388-389, 390, 393; 79 L. Ed. 934.)

In *Leloup* v. *Port of Mobile*, 127 U. S. 640; 32 L. Ed. 311, which is frequently cited as a leading case on the subject, the State of Alabama imposed an annual license tax of $225 "on telegraph companies", without restricting it to telegraph companies doing an intrastate business or to the intrastate business of companies doing both local and interstate business. This Court held the tax invalid as a local impost upon the privilege of doing interstate commerce, saying (p. 647):

> "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company".

No such constitutional infirmity is present in the ordinance here involved which, in terms as well as by virtue of its construction by the Supreme Court of Illinois, applies only to vehicles employed in purely local transportation, i.e., where the point of origin and the point of destination are both within the corporate limits of the same city. The tax is levied solely in respect of such intracity operations; the amount exacted is not increased because of the interstate business done; and vehicles operated exclusively in interstate transportation are not subject to the tax.

(2) This Court has repeatedly declared that it will not suffer local revenue laws to be invalidated as obnoxious to the commerce clause of the Federal Constitution upon a record wholly lacking in proof upon the vital issue of undue burden, but will either remand the cause to the state court for the taking of evidence thereon, or will sustain the legislation under the doctrine of presumptive validity.

In the case at bar, there can be no difference of opinion as to the inadequacy of the record, since there is a complete lack of evidence on the issue of undue burden. Manifestly, therefore, the ordinance either should have been sustained on the doctrine of presumptive validity or, in the alternative, the cause should have been remanded for the taking of evidence on the controlling issue whether the enforcement of the ordinance against the respondent does or will in fact impose an undue burden upon its interstate business. Instead, the Supreme Court of Illinois held the ordinance void and unenforceable as applied to the respondent without any evidence on the crucial issue of undue burden.

Where the evidence is "too inexplicit to supply the answers", and "the needed information is neither accessible to judicial notice nor within its proper scope", the case should be sent back to the lower court for further hearing in order "to avoid constitutional adjudication without adequate knowledge of the relevant facts". (See the dissenting opinion of Mr. Justice Frankfurter in *Hood* v. *Du Mond*, 336 U. S. 525, at p. 574, 93 L. Ed. 865, at p. 893, and cases therein cited.)

(3) The question of the validity of the city ordinance here involved under the commerce clause of the Federal Constitution is of far-reaching importance to all state and municipal taxing bodies.

The Supreme Court of Illinois felt constrained to invalidate the ordinance in deference to the Federal power to prevent or remove obstructions to interstate commerce, notwithstanding that the ordinance represents a species of important revenue legislation enacted pursuant to an express statutory grant to municipalities (R. 4).

The record shows that the respondent operates about 1,200 motor vehicles in its business (R. 12). Each of these is operated daily in some intracity transportation (R. 9). There are more than 2,000 individuals, firms, or corporations who are engaged in the City of Chicago in the transportation of freight by motor vehicle in intracity commerce (R. 10). The aggregate number of vehicles that would be subject to the tax under the ordinance is not shown, but it is clear even from this meager record that the amount of annual revenue collectible thereunder is not inconsiderable.

Apart from the quantum of the revenue involved, the question (squarely presented in this case) whether a local taxing statute (or ordinance) may properly be invalidated as obnoxious to the commerce clause of the Federal Constitution, on a record completely devoid of proof that the ordinance imposes an undue burden upon interstate commerce, would clearly seem to be of sufficient importance to all state and municipal taxing bodies to warrant a clear and unequivocal declaration thereon by this Court. For if inseparability alone be decisive of invalidity, then much local business can escape local taxation simply by integrating itself with interstate operations.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be allowed.

Respectfully submitted,

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APPENDIX "A".

(*Text of Opinion of Supreme Court of Illinois.*)

Docket No. 31312—Agenda 16—March, 1950.

The City of Chicago, Appellant, v. The Willett Company, Appellee.

Mr. Justice Fulton delivered the opinion of the court:

This cause is heard here on direct appeal from a judgment of the municipal court of Chicago, finding the Willett Company, hereinafter referred to as defendant, not guilty in an action brought by the city of Chicago, which charged said defendant with engaging in the business of a carter within the city of Chicago without first having obtained or paid for a license therefor, in violation of chapter 163, Municipal Code of Chicago.

The cause was heard by the court without a jury. The parties filed a stipulation which, with certain testimony of the executive vice-president of the defendant company, constitutes the record in the cause. The trial court has certified that the validity of a municipal ordinance is involved.

Chapter 163 of the Chicago Municipal Code relates to carters and provides, in brief, that any dray type of vehicle driven or employed for the purpose of transporting or conveying property and merchandise within the city for hire or reward shall be deemed a cart within the meaning of the chapter, whether the vehicle be employed or hired from any public stand, public way, barn, garage, office or other place, or whether it be hired for the day, week, month or year. A license tax is imposed by the ordinance for each cart operated or controlled by every carter according to established fees and schedules.

The foregoing section as passed repeals the prior public carters ordinance as well as the furniture movers ordinance.

The defendant is an Illinois corporation, with its offices in Chicago, and was engaged in the business of transporting property by motor vehicles for hire in the city of Chicago. It operates as a contract carrier of commodities by motor vehicle from points and places within the State of Illinois, to points and places in the States of Indiana and Wisconsin. It further carries property within the city of Chicago from point to point under contract with various firms and other interstate and intrastate carriers entering the city. It holds itself out to serve the public and connecing carriers and forwarding companies generally up to the limit of its capacity, either (a) by leasing trucks with drivers to shippers by the hour, day, week or year or other period, (b) by making contracts with shippers to perform all trucking for a fixed period, (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit, (d) by distributing pooling cars, and (e) by rendering collection and delivery service, station or substation service, for rail, water and highway motor carriers and forwarding companies, either under contract or on some other basis. It was further stipulated that the motor vehicles operated by the defendant company in the course of a day's business would transport property from points within the city of Chicago to other points within the city of Chicago, from points within the city of Chicago to other points within the State of Illinois outside the city and from points in Chicago to other States surrounding Illinois and return. The defendant did not comply with the provisions of the carters ordinance, arguing that the ordinance was void and of no legal effect because it is in conflict with the constitution of the United States; it is

in conflict with the constitution of Illinois; it is in conflict with section 23-51 of the Revised Cities and Villages Act; and it is in conflict with the Illinois Truck Act of 1939, as amended.

The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago.

The argument of the city of Chicago, the appellant here, is to the effect that by the terms of the ordinance, the license fee is restricted to carters doing business "within the city" and that the natural meaning of those words restricts the ordinance to intracity business and it cannot apply to interstate commerce. In support of this construction, appellant cites *Pacific Express Company* v. *Seibert*, 142 U. S. 339, and related cases. It further argues that the mere fact that the defendant company is engaged in interstate commerce, as well as intrastate and intracity, does not prevent the city of Chicago from imposing an occupation tax upon the defendant with respect to the purely intracity operations in which the defendant is admittedly engaged. To support this view, they cite cases such as *Osborne* v. *Florida*, 164 U. S. 650, *Pullman Co.* v. *Adams*, 189 U. S. 420, and like cases.

The defendant, on the other hand, cites *People* v. *Horton Motor Lines*, 281 N. Y. 196; *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370, and *Sprout* v. *South Bend*, 277 U. S. 166, and similar cases for the proposition that the State or municipality cannot tax interstate commerce and, in situations such as the one before the court, the tax violates the constitution of the United States and

imposes a burden on interstate commerce. Both parties further argue as to the validity and invalidity of the ordinance in question.

It is the law in this State that this court will give a construction to a statute which will uphold its validity. The presumption is always in favor of the validity of an ordinance passed in pursuance of statutory authority. *City of Chicago* v. *Hebard Express and Van Co.*, 301 Ill. 570.

It seems clear that the ordinance in question is not invalid by its terms, but could be held to be so by reason of its application to certain operators of carts, under the definition of the ordinance, in and around the city of Chicago. In other words, the ordinance is not invalid *per se*. It is only upon its application that a question of its constitutionality can arise. In *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, it was said, " 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce." Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sense.

As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business. In *Osborne* v. *Florida*, 164 U. S. 650, a Florida statute was involved, imposing an annual license tax on all express companies doing business in the State. The Supreme Court of Florida has construed the statute as not applying to interstate business, but only to local

business, intrastate in character. The Supreme Court of Florida held the statute to be valid and the United States Supreme Court affirmed this holding, pointing out that the construction of the statute by the Supreme Court of Florida, as applying only to intrastate business, was binding upon it and would be accepted by it. The case is authority for the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character.

However, the mere operation of trucks by the defendant "within the city" is not sufficient to determine the issues here. The legal effect of such operation must be considered.

As we have previously stated, the question here is one of application of the ordinance to the practical aspects of the hauling done by the defendant. In addition to arguing that the statute itself provides only for taxation upon persons transporting property "within the city" and that this deals only with intrastate business, the city of Chicago admits that where the intracity and interstate operations are inseparable, and the defendant cannot separate the two, nor continue to engage in business if separation is attempted, the argument as to the tax being a burden upon interstate commerce might apply.

It is only when a separation, in fact, of intrastate and interstate business exists that a like separation may be recognized between the control of the State and that of the nation. (See *Osborne* v. *Florida,* 164 U. S. 650, and *Pullman Co.* v. *Adams,* 189 U. S. 420.) The city argues, however, that no inseparability has been shown and that the defendant has not met the burden of proof in this regard. The burden is on him who asserts that, although

actually within, the traffic is legally outside the State; unless the interstate character is established, locality determines the question of jurisdiction. *Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21.

The only evidence in this record is that of Howard L. Willett, Jr., who is the executive vice-president of the defendant company, and who stated on the stand that his company engaged in interstate, intrastate and local freight in the city of Chicago. It is not clear from the testimony or the questions asked of Willett whether or not he was familiar with the legal meaning of the term "intercity freight." It is apparent that the Willett Company operates from Chicago to surrounding States and in that manner engages in interstate commerce. They also engage as a contract carrier with other carriers coming into the city of Chicago from outside the State of Illinois. Whether or not by intercity operation Willett meant only that his trucks operated within the city of Chicago is another thing. The record is silent on that point.

He did testify that it was not possible to separate the intrastate freight from the interstate freight and the intercity freight hauled by the defendant. He further stated that defendant could not keep records of the shipments it made each day within the city of Chicago as to interstate, intracity or intrastate character.

It appears, insofar as we can ascertain from this record, that the defendant herein operates its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the city of Chicago. The defendant itself does not determine what articles it shall carry on its trucks, but carries articles of all kinds, in interstate, intrastate and intracity traffic. It has no basis for differentiating between the shipments which it carries

on its trucks, but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every load the three types of property are so intermingled as to be impossible of separation. It is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a carter's ordinance. The defendant does not keep records of the shipments because he does not handle the shipments as such. He does not go from house to house picking up shipments for delivery within the city of Chicago, but his entire business is concerned with hauling under contract for various firms, enterprises and other contracts carriers in the city of Chicago.

The cross-examination by the city of Chicago did not counteract the statements of this witness, and his statements as to nonseparability remained unchallenged in the record. All of the trucks, over 1200 of them, are engaged in the type of work which has been described. It was evident that the type of contracts the defendant has with other companies deal mainly with other carriers. The defendant has contracts with the Pennsylvania Railroad, Acme Fast Freight, Air Cargo, Ryerson Steel, U. S. Steel, Youngstown Steel, H. J. Heinz Company, Standard Brands Company, Glidden Company and others of that nature. All of these companies have either offices or plants in the city of Chicago.

On cross-examination the witness testified that insofar as the operations of the defendant were concerned, there was no possible way in which they could determine the proportion of local transportation as compared to intrastate and interstate, but he did state that in all the operations, every truck had some of all types of freight on it.

In view of the uncontradicted testimony in the record, it would appear that the defendant is not able to separate

its intracity business from its interstate business, nor can it keep records of such business, nor can it continue in any one of the operations without giving up its entire business. In other words, it needs all of its business to keep in operation.

In *Pullman Co.* v. *Adams,* 189 U. S. 420, a Mississippi statute was involved, imposing a privilege tax on each sleeping-car company carrying passengers from one point to another within the State. The proof showed that the defendant company carried passengers into Mississippi from points outside the State, or out of Mississippi from points within the State, but that the same cars also carried passengers from point to point within the State. It was contended that the tax was invalid as a burden upon interstate commerce. The United States Supreme Court affirmed the judgment of the State court, holding the tax valid, saying that the defendant had the right to choose between what points it would carry persons and, therefore, the right to give up the carriage of passengers from one point to another within the State. The court further said, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The distinguishing factor in that case and in the situation before us is that the record is clear and uncontroverted that the defendant herein is not free to renounce. The record is uncontradicted that the defendant cannot engage in any one portion of its business without the other.

In *Sprout* v. *South Bend,* 277 U. S. 166, the Supreme Court of the United States, considering an ordinance of the city of South Bend imposing a license on motor busses, stated, "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not in-

creased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business." The evidence in the instant cause makes this language applicable to the case here.

The case is similar in some respects to *People* v. *Horton Motor Lines, Inc.*, 281 N. Y. 196, 22 N. E. 2d 338. That case involved an interstate motor carrier which operated a fleet of trucks within the city of New York to deliver and pick up freight to and from its New York terminal or to other shippers within the city. The question involved was whether the public carter's ordinance could be applied to the defendants' small trucks which engaged primarily in interstate commerce, although all operated "within the city." In determining that the defendant was not subject to the carter's ordinance, the court cited *Northern Pacific Railway Co.* v. *Washington ex rel. Atkinson*, 222 U. S. 370. In that case it was said, "The train, although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia, as well as in carrying merchandise which had originated outside the State and was in transit through the State to a foreign destination.. This transportation was interstate commerce, and the train was an interstate train."

The language of this last cited case is applicable here. While the defendant may have intracity loads in part upon its trucks, it is clear that every load combines intrastate and interstate property as well. The incidental carrying of loads within the city does not make the defendant subject

to the license tax here. The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question.

Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee. For the reasons stated herein, the judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

THOMPSON, C. J., and CRAMPTON, J., dissenting.

APPENDIX "B".

(*Text of Ordinance involved.*)

Be it ordained by the City Council of the City of Chicago:

Section 1. This Ordinance shall be known as Chapter 163 of the Municipal Code of Chicago, and shall be designated as the Carters Ordinance:

CHAPTER 163

CARTERS

163-1. Every express wagon, cart, truck, dray, wagon, automobile, autocar, auto truck, or other vehicle of any kind, either drawn by animal or self-propelled, which shall be operated, driven or employed for the purpose of transporting or conveying bundles, parcels, furniture, trunks, baggage, goods, wares, merchandise, produce, or other articles within the city for hire or reward, shall be

deemed a cart within the meaning of this chapter, whether such vehicle is employed or hired from any public stand, public way, barn, garage, office, or other place in the city by the day, week, month or year,

Any person engaged in the business of operating a cart shall be deemed a carter.

163-2. An annual license tax is imposed upon every carter for each cart operated or controlled by him, according to the following schedule:

Horsedrawn vehicle—	
One-horse	$ 2.75
Two-horse	5.50
Three-horse	6.25
Four-horse	11.00
Six-horse	13.75
Automotive vehicles—	
Capacity not exceeding two ton	$ 8.25
Capacity exceeding two but not exceeding three tons	11.00
Capacity exceeding three but not exceeding four tons	13.00
Capacity exceeding four tons	16.50

No license shall issue except upon payment of the full annual license tax.

It shall be unlawful for any person to engage in the business of a carter without first having paid such license tax.

163.3. An application shall be made in conformity with the general requirements of this code relating to applications for licenses and such application shall include a statement of the number of vehicles with such details of descrip-

tion and on such forms as may be required by the City Collector.

The City Clerk shall deliver to each carter, upon payment of the license tax herein imposed, a license emblem which shall bear the words "carter" and the numerals designating the year for which such license tax has been paid. It shall be the duty of the carter to affix the license emblem in a conspicuous place on the vehicle. It shall be unlawful for any person to drive a cart which does not bear such license emblem.

163-4. Any person violating any of the provisions of this chapter shall be fined not less than fifty dollars nor more than two hundred dollars for each offense and each day such violation shall continue shall be regarded as a separate offense.

Section 2. Chapter 163, entitled "Public Carters" as it has heretofore appeared in the Municipal Code of Chicago is hereby repealed.

Section 3. Chapter 132, entitled "Furniture Movers" of the Municipal Code of Chicago, is hereby repealed.

Section 4. This Ordinance shall be in force and effect upon passage and due publication.

(*Journal of the Proceedings of the City Council of the City of Chicago, Illinois, for January 14, 1949, page 3679.*)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 493

CITY OF CHICAGO, A Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 493

CITY OF CHICAGO, a Municipal Corporation,
Petitioner.

vs.

THE WILLETT COMPANY, an Illinois corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent, The Willett Company, an Illinois corporation, presents this statement in opposition to the Petition for Writ of Certiorari to the Supreme Court of Illinois and respectfully submits the following:—

Opinion of the Supreme Court of Illinois

The opinion of the Supreme Court of Illinois is included in the printed transcript of the record (R. 22-29) and is officially reported in 406 Ill. 286.

Jurisdictional Statement

The petitioner relies upon subdivision 3 of section 1257 of Title 28 Judiciary and Judicial Procedure to give jurisdiction to the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois.

Questions Presented

The questions here presented are:

1. Did the decision of the Supreme Court wherein it held that "it was not the intention of the legislative authority of the City of Chicago to include by the use of the phrase, 'within the city' the operations of the respondent corporation," involve a federal question so as to subject the decision to a review by this Court under sub-section 3 of section 1257 of Title 28 Judiciary and Judicial procedure, and,

2. If the Supreme Court decided a Federal Question then

(A) Is the decision in accord with the decisions of this Court on the questions set forth in the Petition for Certiorari?

ARGUMENT

I

Objections to Jurisdiction

In the inception it is pointed out; (1) that the decision of the Supreme Court of Illinois does not draw into question the validity of any treaty or statute of the United States; (2) that the decision of the Supreme Court of Illinois does not hold the Carter's Ordinance of the City of Chicago repugnant to the Constitution, Treaties or Laws of the United States; (3) nor does it decide any question of Title, Right, Privilege or Immunity claimed under the Constitution, Treaties or Statutes of the United States; U.S.C.A. Title 28 Sec. 1257, 3.

The Supreme Court of Illinois in the case at bar merely construed an Ordinance of the City of Chicago and held that the words "within the city" limited the operation of the Ordinance to transportation within the corporate limits of the City of Chicago and was not applicable to the particular business of the respondent which consisted not only of business done within the corporate limits of the City of Chicago but extended to intrastate as well as interstate business.

The opinion of the Supreme Court specifically held that the ordinance in question "is not invalid by its terms." (R. 24) The Supreme Court found that it was not the intent of the Council of the City of Chicago to impose an occupational tax upon the operations of the respondent or others similarly situated. Succinctly stated, the Court merely construed the ordinance and found "that it was not the legislative intent to levy an occupational

tax upon 'carters' whose operations were not confined to the corporated limits of the City of Chicago." (R. 24) It is therefore respectfully submitted that the Supreme Court of Illinois decided this case on a purely non-federal issue.

It is true that the respondent contended among other issues *"that the Carter's Ordinance constituted an interference with and a burden on interstate commerce in violation of the Federal Constitution.* (R. 19) The Supreme Court of Illinois however decided the issues solely upon the question of "legislative intent."

The petitioner under its "Summary and Statement of Material Matters" sets forth that the decision of the Supreme Court of Illinois which held the ordinance of the City of Chicago unenforceable as against the respondent corporation was predicated *"on the sole ground that it was obnoxious to the commerce clause of the Federal Constitution."* (P. 2) while on page 3 of the Petition it asserts

> "Although the Supreme Court of Illinois construed the ordinance, and the tax prescribed thereby, as limited to purely intracity transportation (R. 25), it nevertheless held the ordinance unenforceable as an impermissible interference with the Federal commerce powers * * *." (R. 29)

Again on page 10 it is set forth that:

> "The Supreme Court of Illinois construed the ordinance as confined to local transportation and as not intending to tax interstate business." (R. 25)

The Supreme Court of Illinois in passing on this question said:—

> "We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way what-

> ever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce. Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sence." (R. 25)

This was purely a non-federal ground and independently sufficient to support the judgment. (*Wood* v. *Chesborough*, 228 U. S. 672, 676-80; *West Chicago St. R. Co.* v. *Illinois ex rel. Chicago*, 201 U. S. 506, 519-20; *Chicago B & Q R Co.* v. *Illinois ex rel. Commissioners*, 200 U. S. 561, 581; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54-5; *Adams* v. *Russell*, 229 U. S. 353, 358; *Woods* v. *Nierstheimer*, 328 U. S. 211; *Phyle* v. *Duffy*, 334 U. S. 431; *Williams* v. *Kaiser*, 323 U. S. 471, 477.)

No Federal question was adjudicated by the Supreme Court of Illinois and its decision was predicated upon the adequate and independent non-federal ground that it was not the intent of the Council of the City of Chicago to levy an occupational tax upon 'carters' engaged in intrastate and interstate commerce. It merely construed the phrase "within the City of Chicago" as used in the Carter's Ordinance to exclude all transportation where the point of origin and the point of destination were not both with the corporate limits of the City of Chicago. It held that the ordinance was inapplicable to intrastate as well as interstate operations and particularly inapplicable to the business of the respondent.

The ordinance of the City of Chicago was an attempt by the City of Chicago under its delegated legislative authority to tax "every express wagon, cart, truck, automobile, car truck, etc. * * * employed for the purpose of transporting or conveying bundles, parcels, etc. * * * *within the city of Chicago for hire or reward.*" (R. 5)'

The respondent argued both in the Municipal Court of Chicago and in the Supreme Court of Illinois that the phrase "within the city" did not limit the operation of the ordinance to operations where both the point of origin and the point of destination are in the city and for this reason included shipments which were but a part of interstate commerce and that the ordinance when so construed constituted an interference with and a burden upon interstate commerce in violation of the Federal Constitution. (R. 19)

The City of Chicago in opposition to this contention maintained that the ordinance in question neither purported nor attempted to tax cartage operations beyond the corporate limits of the City of Chicago and sought to have the words "within the city" so construed and interpreted. (R. 17)

The City's Brief filed in the State Court set forth this contention as follows:

> "We wish to make it clear that by intracity business we do not mean to indicate even a trip from a point within the city to a point within the city which is but a segment of an intercity or interstate journey but only such trips as begin and end within the city and do not form a part of a longer journey traversing City of State lines."

The Supreme Court of Illinois rejected the argument of the respondent "Cartage Company" and adopted the interpretation of the words "within the city" suggested by the petitioner. (R. 24) The question of whether or not it was the intent of the City of Chicago in passing the ordinance in question to include the intrastate and interstate business of the defendant corporation is clearly a non-federal question. The State Court stated that the question is one of application of the ordinance to the

practical aspects of the hauling done by the defendant." (R. 25) In adopting this construction of the words "within the city" the Supreme Court of Illinois followed the case of *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, and held that the phrase "within the city" as used in the ordinance meant purely intra-city commerce.

A Writ of Certiorari must be dismissed, where the state court's decision rests on nonfederal ground, notwithstanding unnecessary discussion of constitutional question. *Geo. O. Richardson Machinery Co.* v. *Scott, Okl.* 1928, 48 S. Ct. 264, 276 U. S. 128, 72 L. Ed. 497; *McCoy* v. *Shaw,* Okl. 1928, 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 891.

The Federal Supreme Court will not review a state court decision resting on an adequate and independent nonfederal ground, though the decision also rests upon an erroneous view of federal law. *Radio Station WOW* v. *Johnson,* Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092.

Where decision of state court might have been either upon a state ground or a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it. *Williams* v. *Kaiser,* Mo. 1945, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398; *Fox Film Corporation* v. *Muller,* Minn. 1935, 56 S. Ct. 183, 296 U. S. 207, 80 L. Ed. 158; *Lynch* v. *People of New York ex rel. Pierson,* 1934, 55 S. Ct. 16, 293 U. S. 52, 79 L. Ed. 191; *Klinger* v. *Missouri,* Mo. 1871, 13 Wall. 257, 20 L. Ed. 635.

The construction placed on a state law or ordinance is conclusive on United States Supreme Court. *International Union, U.A.W., A.F. of L., Local 232* v. *Wisconsin Employment Relations Bd.,* Wis. 1949, 69 S. Ct. 516, 336 U. S. 245; *Oklahoma Tax. Commission* v. *Texas Co.,* Okl. 1949, 69 S. Ct. 561, 336 U. S. 342.

What the statutes of a state means, the extent to which it may be limited are questions on which the highest court of a state has the final word. *Musser* v. *State of Utah*, 1948, 68 S. Ct. 397, 333 U. S. 95, 92 L. Ed. 562; *Senn* v. *Tile Layers Protective Union, Local No. 5*, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1229. See also *Atchison, T & S. F. Ry. Co.* v. *Railroad Commission of State of California*, 1931, 51 S. Ct. 553, 283 U. S. 380, 75 L. Ed. 1128.

A federal question does not arise where the claim is made that a state statute is inconsistent with the power of Congress to regulate commerce among the states, and the highest court of the state holds that the statute was intended to apply and applied only to domestic transportation. *Erie R. Co.* v. *Purdy, N. Y.* 1902, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847.

II

The decision is not in conflict with Federal law.

The Supreme Court in construing the ordinance held that it was not repugnant to the Constitution and held the ordinance to be valid. The discussion in the State Court's opinion regarding the question of interstate commerce is mere dictum. However, the general principles expressed by the Court in regard to the Federal Interstate Commerce Clause of Constitution and its application to the case at bar is in complete accord with the decisions of this court.

In order to properly present the issues raised in this Court it is necessary to outline the nature of the respondent's business as shown in the record. The respondent owned a number of trucks which they leased to various concerns in the City of Chicago. The trucks were leased by the day, week, month or year or on a mileage

basis. The respondent furnished a driver with each truck who was loaned to the lessee of the truck. The lessee placed various parcels, packages, etc. in the truck and they were delivered (1) to places within the city (2) to points outside of the city but within the state and (3) to points outside of the State. The respondent exercised no control over the vehicles or the destination or the nature of the freight carried. (R. 12)

The contract of the respondent with the Pennsylvania Railroad Co. is a fair example of the nature of the defendant's business. The defendant company leased to the Pennsylvania Railroad Co. certain of its trucks and supplied the Railroad Company with drivers. The Pennsylvania Railroad Co. used these trucks to pick up packages and freight in the City of Chicago which were delivered to the Pennsylvania Railroad Company stationed in Chicago. These parcels were then transported by the railroad to points outside of the City of Chicago either within the State or to points beyond the State line. The trucks were also used by the Pennsylvania Railroad Company to transport freight and parcels from the railway station in Chicago to points within the City. As far as cartage in the respondent's trucks was concerned the entire carriage was from *a point within the City of Chicago to a point within the City of Chicago* but this carriage was only an integral part of interstate or intrastate transportation. The origin of this freight may have been New York and its destination may have been Los Angeles. Similarly the freight transported in defendant's trucks may have had its origin in New York State and its destination may have been within the City of Chicago or its origin may have been in the City of Chicago and its destination New York. If the Supreme Court of Illinois had decided that the phrase "within the City

of Chicago" as used in the ordinance included this type of transportation the Federal question of whether or not the ordinance was repugnant to the Federal Constitution would have been an issue.

In the case of the *Northern Pacific Ry. Co.* v. *Washington* (222 U. S. 370, 375), the train in question although operating from one point to another in the State of Washington, was also hauling merchandise from points outside of the State, destined to points within the State, and from points within the State to British Columbia as well as carrying merchandise which had originated outside of the State and was in transit through the State to a foreign destination. The Court held this to be interstate commerce and the train an interstate train, despite the fact that it also carried local freight between points in the State of Washington and in view of the unity and indivisibility of the service and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling.

This is the same situation that exists in the case at bar. Under the contract of the defendant with the Pennsylvania Railroad Co., the defendant carries freight that is in interstate commerce as well as freight in intrastate and local commerce. The tax in question is directed at the vehicle carrying these packages. This vehicle is an integral instrumentality of interstate commerce. This ordinance is an attempt to tax such an instrumentality.

The case of *Sprout* v. *South Bend* (277 U. S. 166) is a case involving an ordinance of the City of South Bend, Indiana prohibiting with certain exceptions the operation on its streets of any motor bus for hire unless licensed by the City. The carrier claimed that the ordinance violated the Commerce Clause and the Equal Protection

Clause of the Fourth Amendment. Sprout carried passengers both in intrastate and interstate commerce. The license fee imposed was not an incident to any scheme of municipal regulations but as in the case at bar was for revenue only. In this case the Court held:

> "It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce.
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> • • • • • • • • • •
>
> And it may delegate a part of that power to a municipality.
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>
> But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business. *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Adams Express Co.* v. *New York*, 232 U. S. 14, 30; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647. Compare *Williams* v. *Talladega*, 226 U. S. 404, 417; *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252. The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such commerce is one which a State cannot deny. *Buck* v. *Kuykendall*, 267 U. S. 307; *Bush & Sons Co.* v. *Maloy*, 267

> U. S. 317. A State is equally inhibited from conditioning its exercise on the payment of an occupation tax."

In the case at bar the Ordinance levies a license fee upon "carts" in accordance with their hauling capacity. The tax is the same for "carts" delivering one or two packages a day "within" the City of Chicago, and for carts employed entirely in local transportation. It does not distinguish between freight that is transported from point to point in the city and where the carriage of such freight is a part of its passage in interstate commerce.

In the *Sprout* case at page 167 the Court said:

> "The ordinance makes no distinction between busses engaged exclusively in interstate commerce from those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce."

In *Cooney, Governor of Montana* v. *The Mountain States Telephone and Telegraph Company,* 294 U. S. 384, the State of Montana taxed each telephone used by the defendant. The telephones were used in intrastate and interstate commerce. The company could not discontinue its intrastate business without destroying its interstate business. In passing upon this case the Court said at page 392:

> "A State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of the business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Mobile,* 127 U. S. 640. There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax 'which covers the entire operations'." id. p. 647; See *Williams* v. *Talladega,* 226 U. S. 404, 419. Where

the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout* v. *South Bend*, 277 U. S. 163, 171; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470.

"A privilege or occupation tax which a state imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. *Leloup* v. *Mobile, supra; Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, 46; *Crutcher* v. *Kentucky*, 141 U. S. 47, 59; *Adams Express Co.* v. *New York*, 2342 U. S. 14, 29, 31; *United States Express Co.* v. *New York*, 2343 U. S. 35, 36; *Bowman* v. *Continental Oil Co.*, 256 U. S. 647, 648. In the case of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments 'were handled in the same vehicles, and by the same men' that were employed in connection with the interstate transportation and it was impracticable to effect a separation. *Adams Express Co.* v. *New York, supra; United States Express Co.* v. *New York, supra.* In *Bowman* v. *Continental Oil Co., supra* the question arose under a statute of New Mexico, laying an annual license tax of fifty dollars for each station distributing gasoline.

III

The ordinance if construed to apply to the business of the respondent constitutes an undue burden upon interstate commerce.

The evidence in this case clearly shows that the defendant was engaged in interstate, intrastate and local commerce and that it was not possible to separate the local and the intracity freight from the interstate freight and that the respondent did not have control of the loading or destination of the trucks so that it could differentiate between the various type of shipments carried on the truck. The Petitioner admits that the shipments were inseparable but argues that this fact is insufficient to show that the ordinance constituted an undue burden upon interstate commerce and cites in support of this contention the case of *Pacific Telephone & Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403.

This case is clearly distinguishable from the case at bar. In the case at bar the tax is levied against an instrumentality used in both intra and interstate commerce. This tax varies from $13.50 a year to $16.50 a year depending upon the capacity of the truck. In the *Pacific Telephone & Telegraph Co.* case the tax was not upon an instrumentality that carried both types of commerce but was a tax measured solely by the percentage of the gross income derived from intrastate business.

In the case of *Cooney, Governor of Montana* v. *The Mountain States Telephone and Telegraph Company*, 294 U. S. 384, where a tax was levied upon telephone used both in intra and interstate business the Court held the tax being indiscriminate in its application *necessarily burdened interstate commerce.*

It is obvious that the tax proposed by the ordinance unless the construction of the State court is accepted

is not a tax upon intrastate business but is a tax upon trucks that carry both intrastate and interstate freight. A tax upon an instrumentality of interstate commerce, even though small in amount, is necessarily a burden upon interstate commerce while a tax upon the gross local business is not a burden per se and proof is required to establish it.

IV

There are no important questions of law or policy involved

It is respectfully submitted that this case presents no important questions of Federal Law and that it is not in conflict with the decision of this Court or with those of any other Federal Court of Appellate jurisdiction. There is no showing that this decision is applicable to any other firm or corporation operating within the City of Chicago or elsewhere in the State of Illinois or that it will have an important or far reaching application. The State Court merely construed the ordinance in question and held it valid but that it did not apply to the intra and interstate business of this respondent and that the ordinance as construed was not repugnant to the Commerce Clause of the Federal Constitution.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 493

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY BRIEF FOR PETITIONER.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY BRIEF FOR PETITIONER.

I. (Reply to Point IV).

The question whether application of the city taxing ordinance to carriers of freight whose intrastate and interstate operations are inseparable violates the commerce clause of the Federal Constitution, even where no proof of undue burden upon interstate commerce appears, affects not only the respondent but thousands of other freight carriers in the City of Chicago similarly situated, and is of far-reaching importance to all state and municipal taxing bodies.

We are replying to respondent's last contention first, because its brief asserts (p. 15) that this case presents no Federal question of any importance, and it would also have

this Court believe that a determination by this Court of the question of the validity of the ordinance under the commerce clause of the Federal Constitution would affect only the respondent and have no far-reaching consequences. The exact contrary is true, however, for as is shown by the Stipulation of Facts in this case there are "upwards of 3,000 individuals, firms or corporations" engaged in the transportation of freight by motor vehicle within the City of Chicago "who are similarly situated with the Defendants" (meaning the respondent) "as to matters and things complained of herein" (R. 10).

Moreover, the City of Chicago, the petitioner herein, as well as every State and municipality in the Nation will be affected by the decision because their power to tax purely local occupations is directly involved. The consequence of the erroneous decision of the Supreme Court of Illinois, if it were to receive the implicit sanction of this Court by not being disapproved, is to strip the several States and their municipal subdivisions of the power to levy occupational taxes upon purely local business in every case where it integrates itself with interstate commerce so as to become inseparably intertwined therewith, despite a total absence of proof that an undue burden upon interstate commerce actually results. This decision, if permitted to stand, will provide a ready avenue for the escape of purely local business from local taxation and would destroy the well established line of demarcation between Federal and State power in the field of taxation.

It is respectfully submitted, therefore, that the case presents a substantial Federal question of sufficient public importance to require its resolution by this Court.

II. (Reply to Point I).

The decision here sought to be reviewed rests solely and explicitly upon the erroneous determination of a substantial Federal question.

Respondent contends (pp. 3-8 of its brief) that the decision below involves no Federal question, hence is not reviewable under Section 1257 (3) of Title 28, United States Code, because it rests upon a construction of the ordinance as limited to intracity transportation and as not intended to apply to interstate commerce at all,—a holding asserted to be a non-federal ground adequate to support the judgment. A conclusive answer to this contention is that the court explicitly recognized that the ordinance as so interpreted was clearly valid under the commerce clause, yet held the ordinance to be invalid as applied to respondent upon the express ground that an undue burden upon interstate commerce was established by a mere showing of inseparability between respondent's local and interstate operations, and without any evidence whatsoever of undue burden. It is difficult to conceive how the decision which invalidates the ordinance can rest upon a construction of the ordinance which if applied would serve to validate it. It would seem to be manifest that the decision of the Supreme Court of Illinois against the validity of the ordinance in its application to the respondent does not rest upon such validating construction at all, but rather upon the erroneous determination by the court of the interstate commerce question. That this is the sole and exclusive basis of the Court's decision clearly appears from the following language of the court's opinion:

> "While the defendant may have intracity loads in part upon its trucks, it is clear that every load combines intrastate and interstate property as well. The incidental carrying of loads within the city does not

make the defendant subject to the license tax here. The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question.

"Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee." (R. 29).

This Court has held that it may examine the opinion of the state court to ascertain whether or not a Federal question was raised and passed upon, and whether or not the decision rests upon the determination of that Federal question. (*State of Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98-99; 82 L. ed. 685.)

It is evident from an examination of the court's opinion that this case is one in which the validity of a State statute (ordinance) was drawn in question on the ground of its being repugnant to the Constitution or laws of the United States, and hence comes within the certiorari jurisdiction of this Court under Section 1257 (3) of Title 28, United States Code. It is obvious, further, that respondent's contention that the case does not come within said Section 1257 (3) rests upon its misconception as to the real basis of the court's decision.

While it is true that the case also raised non-federal questions, it is clear from the opinion that none of these was made a ground of decision. It is submitted, therefore, that respondent's claim that the decision rests upon a non-federal ground independently sufficient to support the judgment is entirely without foundation.

The presence of additional non-federal questions in the case constitutes no bar to a review by this Court where, as here, the decision of the state court is based solely upon

the Federal question presented. It is well settled that where the state court explicitly bases its decision solely upon a determination of the Federal question, this Court will review the case even though the state court, consistently with the record, might have based its decision upon adequate non-federal grounds. (*Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 197; 89 L. ed. 173; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98; 82 L. ed. 685; *Grayson* v. *Harris*, 267 U. S. 352, 358; 69 L. ed. 652; *Rogers* v. *Hennepin County*, 240 U. S. 184, 188-189; 60 L. ed. 594.)

We do not dispute the proposition that this Court is bound by the construction placed upon the ordinance by the state court, but this does not mean that this Court is also bound by the state court's decision of the Federal question forming the sole basis of that decision. This Court has frequently asserted that while it will accept the state court's construction of local legislation as conclusive, it will nevertheless examine for itself the Federal question forming the basis of the state court's decision, and indeed is in duty bound to determine the Federal question in accordance with its own judgment. (*Crew Levick Co.* v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 294; 62 L. ed. 295; *Storaasli* v. *State of Minnesota*, 283 U. S. 57, 62; 75 L. ed. 839; *Kovacs* v. *Cooper*, 336 U. S. 77; 93 L. ed. 513; *Henderson Bridge Co.* v. *City of Henderson*, 173 U. S. 592, 608-609; 43 L. ed. 823).

In the *Crew Levick* case, for example, this Court accepted as conclusive the state court's construction as to the scope and meaning of the state statute there involved, but refused to follow the state court's decision of the Federal question presented and reversed the judgment.

Likewise, in the following three cases, this Court recognized and accepted the binding force of the state court's

construction of the state statutes involved, but nevertheless proceeded to decide the Federal questions presented (their validity under the commerce clause) in conformity with its own views, affirming the state court judgment in the first cited case but reversing it in the other two. (*Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 21-22; 35 L. ed. 613; *Western Union Telegraph Co.* v. *Alabama,* 132 U. S. 472, 474-475; 33 L. ed. 409; *Illinois Central Railroad Co.* v. *Illinois,* 163 U. S. 142, 152-153; 41 L. ed. 107.)

Respondent contends, further, that since the Supreme Court of Illinois construed the ordinance as applying only to intracity transportation, no Federal question under the commerce clause was presented, citing in support of this proposition the case of *Erie Railroad Co.* v. *Purdy,* 185 U. S. 148, 46 L. ed. 847. This contention is in effect nothing more than a reiteration of the untenable proposition that a validating construction on one aspect of the case cancels out the effect of the invalidating decision on the basic issue involved. We have already pointed out that the state court's construction of the meaning and scope of the ordinance and its decision as to whether it constituted an undue burden upon interstate commerce represent adjudications upon two separate and distinct issues, the former a matter of local law, the latter a question arising under the Federal Constitution.

Moreover, the case of *Erie Railroad Co.* v. *Purdy,* 185 U. S. 148, 46 L. ed. 847, does not support the respondent, because there the state court had construed the local statute in favor of the railroad on the interstate commerce question involved, and this Court properly held that its review jurisdiction could not be invoked by the railroad by utilizing as a ground of jurisdiction the question which had been decided in its favor.

III. (Reply to Point II).

The decision of the Illinois Supreme Court constituted a holding upon the Federal question involved in conflict with the applicable decisions of this Court.

Respondent contends that since the state court construed the ordinance to be limited to intracity transportation, the court's decision must be regarded as one sustaining the validity of the ordinance, and that the discussion in the opinion as to the invalidity of the ordinance under the commerce clause as applied to respondent is "mere dictum" (p. 8). The fallacy of this argument lies in treating the construction of the ordinance as the decision of the case. Far from being "mere dictum," however, the court's invalidation of the ordinance under the commerce clause as applied to the respondent is the sole and exclusive point upon which the court rested its decision against the city and in favor of the respondent. In the absence of this so-called dictum, the decision of the Supreme Court of Illinois would have been in favor of the City of Chicago.

On pages 8 and 9 of its brief, respondent refers to the evidence in the record by which it claims to have established inseparability between its intracity and interstate operations. The question presented, however, is not whether the evidence was sufficient to show inseparability, but whether, assuming such inseparability, it was proper for the court to hold the ordinance invalid in its application to respondent in the absence of a showing that the ordinance actually resulted in casting an undue burden upon respondent's interstate business. Inasmuch as the record shows without dispute that the respondent was using each of its trucks daily in intracity transportation (R. 9), it follows that the decision of the Illinois Supreme Court that the City of Chicago is without power to enforce

this ordinance against the respondent rests entirely upon that court's determination (erroneously, we submit,) of the Federal question whether a showing of inseparability, without a showing of undue burden, is sufficient to exempt respondent from local taxation upon its intracity business.

The case of *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; 56 L. ed. 237; (Resp. Br., p. 10), is not pertinent to the case here, because there this Court merely held that a train carrying interstate and intrastate freight at the same time was subject to Federal regulation, notwithstanding that part of its load consisted of intrastate commerce. There is nothing in that decision militating against the power of a city or state to tax intracity or intrastate commerce merely because the taxpayer is also engaged in interstate commerce at the same time. That case involved the applicability of Federal legislation regulating the hours of service of employees in interstate commerce and not the applicability of local legislation taxing only the intracity operations of persons engaged both in intracity and interstate commerce. Here the ordinance contains no regulatory provisions but is purely a revenue measure; nor does it seek to tax the vehicle for its use in interstate commerce, but only for its use in purely local transportation. The fact that the vehicle is used at the same time in carrying both intracity and interstate loads should not permit respondent to escape reasonable taxation upon its local business measured by a reasonable annual tax upon each vehicle used in such purely local operations.

The case of *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. ed. 833, (Resp. Br., pp. 10-12), has already been distinguished in our petition (p. 15). This Court pointed out in that case that the Supreme Court of Indiana construed the ordinance there involved as applying not only to busses engaged in intrastate commerce, and to busses engaged both in intra-

state and interstate commerce, but also to busses operated exclusively in interstate commerce, and it is for that reason that this Court held the local occupation tax void under the commerce clause (277 U. S. 163, at p. 171).

Respondent contends (p. 12) that the ordinance in the case at bar does not distinguish between the transportation of freight transported from point of origin to point of destination within the city and the movement of freight from point to point within the city as a segment of a longer journey in interstate commerce. This is indeed a strange contention in view of the binding construction placed upon the ordinance by the Supreme Court of Illinois as limited to purely intracity freight, *i. e.*, where point of origin and point of destination are both within the corporate limits of the city (R. 24-25).

The case of *Cooney* v. *Mountain States Telephone and Telegraph Co.*, 294 U. S. 384, 79 L. ed. 934, (Resp. Br., pp. 12-13), has likewise been distinguished in our petition (p. 17) on the ground that there the local taxing statute was held invalid because applying indiscriminately both to local and interstate business. The tax there was imposed upon each telephone instrument used in furnishing telephone service in the State of Montana, and this Court adverted to the fact that it did not appear that the statute had been construed by the state court (294 U. S. 384, at p. 398). This Court also pointed out the distinction between the two cases of *State* v. *Rocky Mountain Bell Telephone Co.*, 27 Mont. 394, 71 Pac. 311, where the state court construed the statute to apply only to telephone instruments used in purely intrastate business and held it to be valid, and *State* v. *Northern Pacific Express Co.*, 27 Mont. 419, 71 Pac. 404, where the state court held the occupation tax void because it applied indiscriminately to interstate as well as to local transportation (294 U. S. 384, at pp. 388-389.) This

Court held the tax in the *Cooney* case invalid for the following explicit reasons (294 U. S. 384, at pp. 390-391):

> "No distinction is made between interstate and intrastate service.
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> "Again, there is no limitation as to use, control or operation in intrastate business.
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> • • • • • •
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> "The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate.
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> • • • • • •
>
> "All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax."

The ordinance in the case at bar is not subject to this objection because, by its terms and as construed by the Supreme Court of Illinois, it limits its operation to vehicles only in so far as they are used in intracity business and does not attempt to tax vehicles used exclusively in interstate commerce.

Respondent contends that the ordinance seeks to tax trucks that carry both intrastate and interstate freight at the same time. That, however, is not within the express design of the ordinance, but a consequence of the use of the same vehicles in both types of operation. It is important to note in this connection that no part of the tax levied by the ordinance is referable to any interstate business in which a vehicle may be used, but only with respect to its use in intracity transportation in the purely local sense of that term. The fact that the respondent carries both local and interstate freight in the same vehicles at the same time does not, we submit, serve to destroy the city's power to

tax the vehicle by reason of its use in intrastate commerce in the absence of a showing that the tax either in character or amount imposes an undue burden upon respondent's interstate operations.

IV. (Reply to Point III).

There is no evidence whatever that the ordinance as applied to respondent's business constitutes an undue burden upon interstate commerce, and the fact that the tax is in the form of a flat annual fee upon each vehicle rather than a percentage of annual gross receipts does not establish that such a burden exists.

Respondent argues that proof of undue burden is unnecessary in this case because the flat annual tax imposed upon each vehicle is really a tax upon the vehicle's entire operations both intrastate and interstate. However, as already pointed out, the ordinance both in terms and as construed by the Supreme Court of Illinois is limited to the use of the vehicle in local commerce, and to no extent does the ordinance impose or seek to impose any portion of the tax with reference to the use of the vehicle in interstate commerce. Consequently, the fact that the tax is a flat impost on the vehicle rather than measured by a percentage of gross receipts from the local business does not render the tax invalid *per se* as a burden upon interstate commerce, especially since this Court has held that inseparability between both classes of commerce does not necessarily indicate that a local tax upon the intrastate operations casts any undue burden upon the interstate portion of the business. (*Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission,* 297 U. S. 403, 80 L. ed. 760).

Nor does the fact that the proportion of intracity and interstate business may not be the same for each vehicle,

or varies during different periods in the use of the same vehicle, have any material bearing upon the question. As this Court has said in *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 79 L. ed. 1439:

> "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. • • • One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." (295 U. S. 285, at p. 289).

It should also be pointed out that respondent's claimed preference for a tax measured by a percentage of gross receipts from local operations is not motivated by any desire to pay such a tax. Indeed, a tax based upon such a formula would introduce insuperable complexities in administration and enforcement which are obviated by the present flat annual charge upon each vehicle. According to the record here, respondent's executive vice president testified that respondent "does not keep any record to determine the proportion of interstate as compared to intrastate and local operations" (R. 12), and that "there is no way in which we can determine the proportion of local transportation as compared to interstate and intrastate" (R. 13). The Stipulation of Facts recites that there are more than 3,000 motor freight carriers in the City of Chicago "similarly situated" (R. 10). The City of Chicago was thus confronted with a difficult choice as to method, and it determined that a flat annual tax, reasonable in amount, upon each vehicle used in intracity transportation, and in accordance with its load-carrying capacity, was a fair and legally permissible formula.

This Court has recognized the difficulties confronting States and municipalities in gearing local taxes to relevant

factors, and has declared that the validity of a local tax should be judged by its result, not its formula; that the tax will be sustained if not shown to be unreasonable in amount (*Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 545; 94 L. ed. 1053); and that the burden of proof in this respect is upon a carrier who challenges the validity of the tax (339 U. S. 542, at p. 548).

Respondent has not shown that the moderate schedule of flat annual charges per vehicle based upon its load-carrying capacity is in excess of a reasonable fee for the privilege of its use in intracity commerce. Consequently, there is no basis for the contention that any portion of the tax constitutes a charge for the privilege of using the vehicle in interstate commerce. The ordinance, as construed, disclaims any such intention, and the record wholly fails to show that its application to respondent will produce any such unconstitutional result.

Conclusion.

It is accordingly respectfully submitted that the petition for a writ of certiorari should be allowed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 493

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois corporation,
Respondent.

PETITION FOR REHEARING AND FOR STAY OF MANDATE.

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PETITION FOR REHEARING AND FOR STAY OF MANDATE.

Now comes the City of Chicago, a Municipal Corporation, Petitioner, by its attorneys, and requests a rehearing of the order entered by this court in this cause on April 23, 1951, but only to the extent that said order vacates the judgment of the Supreme Court of Illinois and remands the cause to that court for clarification as to whether the judgment of that court rests on an adequate and independent state ground, or whether decision of a federal question was necessary to the judgment rendered. It is also prayed that issuance of the mandate be stayed pending the disposition of this petition for a rehearing.

The ground upon which a rehearing is asked is that the decision of the Supreme Court of Illinois excluding from the reach of the ordinance vehicles operated in nonsepar-

able local and interstate transportation rests, not upon a construction of the ordinance as not applying to such vehicles, but upon the erroneous determination by that court that, because of such inseparability, without more, the imposition of a municipal tax upon the local operations of such vehicles is precluded by the commerce clause of the Federal Constitution.

In *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 68 L. ed. 582, this court held (p. 120) that a decision of the highest court of a state excluding maritime contracts from the operation of a state arbitration statute, not as a matter of statutory construction but due to its opinion that the Federal Constitution so required, presented a federal constitutional question reviewable by this court.

The only problem of construction presented to the Supreme Court of Illinois was whether the phrase "within the city" used in the ordinance included interstate shipments carried by vehicles operating within the city limits or applied only to purely local business. The defendant contended that the ordinance applied indiscriminately both to interstate and intracity business done within the city limits, and was, therefore, invalid as an attempt to tax interstate commerce. The city took the position that the ordinance sought to tax only such operations as were purely local. The Supreme Court of Illinois properly construed the ordinance as not applying to interstate business, but only to local business, intrastate in character. The court then pointed out that, upon such construction, the ordinance was clearly valid under the commerce clause of the Federal Constitution, and, referring to *Osborne* v. *Florida*, 164 U. S. 650, said that that case was authority for the rule that a statute (or ordinance) so construed does not exempt the carrier from taxation upon its business which is solely within the State (or city), even though at the same time the same company may do a business which

is interstate in character. (*City of Chicago* v. *The Willett Company*, 306 Ill. 286, 290.)

It is clear from the foregoing that the Supreme Court of Illinois did not construe the ordinance to mean that if a vehicle was operated in both interstate and intracity commerce it was not subject to the tax upon its purely local operations. Such a construction would have been manifestly unreasonable, since the carrying of a single interstate parcel on a single day of the year by a vehicle otherwise engaged exclusively in local commerce would permit such vehicle to escape the tax. However, as already stated, the court did not so construe the ordinance, but specifically declared that a vehicle operated both in intracity and interstate commerce may be municipally taxed on the former, although not on the latter.

While the opinion of the Supreme Court of Illinois might well have been more explicit, it is nevertheless clear from a reading thereof that what impelled the court to hold that defendant's vehicles were not subject to the tax even as to their intracity business was, *first*, its conclusion that defendant's intracity and interstate operations were inseparable, and *second*, (and this is the crux of the court's decision), that this factor of inseparability, without more, clothed defendant's entire operations with an interstate character and precluded the levying of the tax even upon the purely local portion of defendant's intertwined operations. This holding is clearly contrary to the well-settled doctrine announced by this court that a mere showing of inseparability, without a showing of undue burden, does not place the local operations beyond the reach of the local taxing power.

It is accordingly respectfully submitted that the determination of the Supreme Court of Illinois excluding defendant's purely local operations from the reach of the ordi-

nance clearly rests upon that court's erroneous decision of a federal question arising under the commerce clause of the Federal Constitution.

Prayer.

Wherefore petitioner prays that the issuance of the mandate be stayed pending the disposition of this petition for a rehearing; that a rehearing be granted; and that, upon such rehearing, this court, having granted certiorari, retain jurisdiction of this cause for the purpose of passing upon the federal question presented.

Certificate of Counsel.

Each of the undersigned, attorneys for petitioner, hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay; and also certify that said petition is restricted to intervening circumstances of substantial and controlling effect, and to other substantial grounds not heretofore available to petitioner, and for that reason not previously presented, the first occasion for such petition for rehearing arising from that part of the order entered by this court in this case on April 23, 1951, vacating the judgment of the Supreme Court of Illinois and remanding the cause to that court for clarification of the ground of decision.

Respectfully submitted,

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Attorneys for Petitioner.

No. 493. CHICAGO *v.* WILLETT COMPANY. On petition for writ of certiorari to the Supreme Court of Illinois. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois for clarification by that court to show, in the light of *Minnesota* v. *National Tea Co.*, 309 U. S. 551; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, whether the judgment herein rests on an adequate and independent state ground or whether decision of a federal question was necessary to the judgment ren-

dered. *J. Louis Karton* and *Arthur Magid* for petitioner. *Charles Dana Snewind* for respondent. Reported below: 406 Ill. 286, 94 N. E. 2d 195.